Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVE GOETZ, Commissioner, Tennessee Department of Finance and Administration, et al.,

Petitioners,

v.

JOHN B., by his next friend, L.A., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the prohibition against bias on the part of judicial and quasi-judicial officers apply to a court-appointed special master and experts whose findings of noncompliance with a consent decree are adopted and whose proposed remedial measures are provisionally ordered by the district court?

2. To the extent that a court-appointed special master and experts do suffer from a disabling bias, must their work product and other contributions from the point of their disqualification forward be immediately suppressed from the record?

PARTIES TO THE PROCEEDING

Petitioners are M.D. Goetz, Commissioner, Tennessee Department of Finance and Administration, Darin J. Gordon, Deputy Commissioner, Bureau of TennCare,* and Viola Miller, Commissioner, Tennessee Department of Children's Services. Petitioners are defendants in the district court, all sued in their official capacity as officers of the State of Tennessee, and were Petitioners in the court of appeals.

Respondents are John B., Carrie G., Joshua M., Meagan A., and Erica A., all by their next friend L.A.; Dustin P., by his next friend Linda C.; Bayli S., by her next friend, C.W.; James D., by his next friend Susan H.; Elsie H., by her next friend, Stacy Miller; Julian C., by his next friend Shawn C.; and Troy D., by his next friend, T.W. Respondents, plaintiffs in the district court and Respondents in the court of appeals, represent a certified class of children enrolled in Tennessee's Medicaid program, TennCare.

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* Mr. Gordon's predecessor as Deputy Commissioner, Bureau of TennCare, J.D. Hickey, was a party in the proceedings below. Mr. Gordon is automatically substituted pursuant to this Court's Rule 35(3).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners M.D. Goetz, Jr., *et al.*, in their official capacities as officers of the State of Tennessee, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals denying the petition for writ of mandamus is unpublished, and is reprinted in the appendix hereto ("App.") at App. 1a. The order of the court of appeals denying rehearing and rehearing *en banc* is reprinted at App. 81a. The relevant orders of the district court are reprinted at App. 4a-80a.

JURISDICTION

The court of appeals denied the petition for a writ of mandamus on June 8, 2006, and entered an order denying rehearing and rehearing *en banc* on September 29, 2006. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT STATUTORY PROVISIONS

Relevant provisions of 28 U.S.C. § 455 and FED. R. CIV. P. 53 are reprinted at App. 82a-91a.

STATEMENT

Petitioners are officers of the State of Tennessee who administer its Medicaid program, called "TennCare." Petitioners are subject to a consent decree that governs various aspects of the State's provision of health care to children enrolled in TennCare. The questions presented arise from a troubling series of surreptitious *ex parte* contacts that the then-presiding district court judge had with a court-appointed special master and several experts appointed by the special master. From the limited information available to Petitioners, it appears that the special master and his experts were serving as partisans relaying contentions by Respondents and their affiliates to the district court. On the basis of the *ex parte* communications, the court adopted findings of Petitioners' noncompliance with the consent decree and provisionally adopted extraordinarily sweeping and invasive remedial measures proposed by the special master and experts for imposition against Petitioners. Some 18 months after these *ex parte* communications first came to light and Petitioners sought discovery into them, Senior District Court Judge John T. Nixon, the then-presiding judge, vacated the order arising from his *ex parte* communications with the special master and experts and then recused himself.

The case was immediately reassigned to District Court Judge William J. Haynes. Judge Haynes ordered that the same special master and experts would continue to serve as his officers; that the findings and relief they had formulated would be the focus of a forthcoming contempt hearing; and that the burden of proof would be shifted to Petitioners based upon the vacated order that the special master and experts had crafted through their

ex parte communications. Judge Haynes did so without regard for Petitioners' arguments that the subordinate officers he was retaining and relying upon had demonstrated a disqualifying bias and/or appearance thereof, and that, at the very least, targeted discovery into the issue of bias was essential to put such concerns to rest.

Bereft of other recourse, Petitioners petitioned the Sixth Circuit for a writ of mandamus directing disqualification of the special master and experts or, alternatively, authorizing discovery into their ostensible bias. A panel of the court below summarily denied the petition without benefit of briefing, concluding that Petitioners' demonstration of the appearance of bias on the part of the special master and experts was immaterial. With respect to the continued participation of the special master and experts, the panel stated that Petitioners had not shown that the special master and experts were "quasi-judicial officers" subject to the prohibition against actual or apparent bias. With respect to Judge Haynes' refusal to suppress the vacated order that had been tainted by the *ex parte* communications, the panel stated that the order and the communications from which it sprang were matters of record that could thenceforward simply be litigated by the parties.

Petitioners sought rehearing and rehearing *en banc* on the ground that the Sixth Circuit's stated reasoning conflicts with the on-point decisions of its sister circuits and compromises fundamental norms and rules protecting the integrity of the federal judicial process. On September 29, 2006, the court denied rehearing and rehearing *en banc*.

1. In May 2004, Respondents claimed that State legislation enacting certain reforms to the TennCare

program violated the governing consent decree. Petitioners denied the allegation, asserting that the State was in substantial compliance with the decree. Although Respondents bore the burden of presenting clear and convincing evidence that the State had violated a specific provision of the decree, *see, e.g.*, *Rolex Watch U.S.A. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996), that settled procedure was not followed. Instead, the special master and the seven experts that the special master had appointed to assist him (collectively, "Office of the Special Master" or "OSM"), who had all freely consulted *ex parte* with Respondents' counsel,[1] in turn surreptitiously consulted *ex parte* with Judge Nixon about the merits of the case. What is more, in August 2004, the OSM submitted a then-undisclosed report, also *ex parte*, to Judge Nixon urging adverse findings against the State and proposing the imposition of extraordinarily sweeping and invasive remedial sanctions. Judge Nixon relied upon these proposed findings in an order entered on October 22, 2004, finding the State in violation of the decree and provisionally adopting the special master's proposed remedial decree. *See* App. 24a-32a.

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[1] The court's previous orders had authorized the OSM to monitor and facilitate compliance through regular contacts with *the parties*, including confidential *ex parte* communications with the parties. *See* App. 72a-75a, 78a-79a. These orders comported with the instructions of the 2003 Advisory Committee Notes to FED. R. CIV. P. 53 by making clear that *ex parte* communications were not to *extend to the district court*. App. 91a. Indeed, the court later confirmed that it would be inconsistent with the role contemplated by the orders appointing the special master and experts for the OSM to weigh in on disputed merits issues even by way of in-court testimony. *See* App. 71a-75a.

According to Judge Nixon's October 2004 order and the previously undisclosed August 2004 report, in April 2004 (one month before Respondents had even moved for relief), the special master had "obtained a copy of the proposed [TennCare reform] legislation from *concerned advocates*," whereupon "[a] critique of the now legislated medical necessity definition was drafted immediately and shared *with the Court*." App. 158a-159a (emphases added); *see also* App. 157a, 198a. Thus, it appeared that the OSM had been surreptitiously serving as an *ex parte* conduit for arguments by Respondents and unnamed "concerned advocates" for at least several months (from April through October 2004). Indeed, among OSM's ranks was one expert, Sara Rosenbaum, whom Respondents had previously retained as their own expert. Petitioners had not objected to the participation of this obvious partisan in reliance upon the court's prior orders prohibiting OSM from having *ex parte* contacts with the court or otherwise speaking to disputed merits issues. *See supra* at 4 n.1.

Judge Nixon adopted the OSM's previously undisclosed, *ex parte* finding that Petitioners were in violation of the consent decree without affording Petitioners prior notice or opportunity to respond, and the court provisionally adopted the sweeping relief crafted by that office. The proposed relief, in short, contemplated nothing less than a comprehensive judicial takeover of TennCare as administered to children. By way of example only, the proposed further relief would:

- give the district court ultimate authority to "recruit, employ, and direct sufficient human resources [within State agencies] to comply with the Order," if "not satisfied" with the State's personnel decisions, App. 65a-66a;

- prohibit the Petitioners from denying any claim of coverage under TennCare for a child for any service or treatment ordered by a physician, "unless they are able to demonstrate to the satisfaction of the Court that coverage for a particular recommended treatment or service request falls outside" Medicaid's statutory definition of "medical assistance," App. 43a;

- require Petitioners, "[e]ffective immediately," to "revise the payment rates for all EPSDT periodic and interperiodic screens, as well as all primary and specialized medical, mental health, behavioral, diagnostic, and treatment services which are furnished to children," App. 50a;

- require submission to the district court for its approval of "draft contract amendments" with "all TennCare prime and sub-prime contracts," App. 64a-65a.

In sum, this proposal for further relief envisioned the district court effectively assuming control of State agencies and personnel for purposes of administering TennCare to children. The proposal afforded relief far more extensive and more invasive than the most ambitious Respondents might seek in any complaint. As it now appears, the special master and his experts, after engaging in authorized *ex parte* communications with Respondents, undertook an unauthorized *ex parte* collaboration with Judge Nixon to develop what became the court's findings and provisional relief on the merits of this case.

Upon learning of the substantive *ex parte* communications between Judge Nixon and the special master's office, Petitioners promptly moved for leave to take discovery

regarding the extent, nature, and content of the *ex parte* communications. Respondents immediately responded with a series of procedural maneuvers transparently designed to prevent Petitioners from taking the requested discovery. First, Respondents moved to suspend all further proceedings in the case, and Judge Nixon granted the motion the following day without awaiting Petitioners' response. *See* App. 22a-23a. When that suspension expired in January 2005, Respondents moved for a renewed suspension, which Petitioners opposed. Judge Nixon effectively granted the renewal by taking no action whatever in the case for the next nine months (apart from ordering, over Petitioners' objection, continued payment of more than $200,000 in fees and expenses incurred by the OSM despite the suspension of all proceedings).

Finally, in December 2005, after the case had been suspended for more than a year, *Respondents themselves* moved to vacate the October 2004 order finding Petitioners noncompliant and proposing sweeping further relief. Respondents did so, they expressly acknowledged, in hopes of mooting Petitioners' motion for discovery into the *ex parte* communications. *See* App. 19a. Judge Nixon granted the motion, vacating the October 2004 order and declaring Petitioners' discovery motion moot, without prejudice to Petitioners renewing it, which Petitioners promptly did in light of the continued participation of the special master and experts in the case. *See* App. 17a, 19a-20a. At that point, Judge Nixon, *sua sponte*, recused himself on February 3, 2006, leaving to his successor the question whether the OSM could continue to serve. See App. 21a.

2. Within a week of Judge Nixon's recusal order, Judge Haynes stated that he would retain the special master and experts, albeit with a new title. He agreed that

"they were quasi-judicial officers," but determined that he would use them as "plain experts." App. 127a. In a subsequent order, however, Judge Haynes decided that the special master and experts would continue to "perform the same duties [as they did previously], except as witnesses," and would now be called "technical advisors" rather than "experts." App. 4a.

Judge Haynes instructed the former special master and experts to advise five new judicial "monitors" appointed by Judge Haynes, and indicated that the former special master and experts would be asked to testify before him regarding the very same proposal for further relief that they had formulated *ex parte* with Judge Nixon, as reflected in the vacated October 22 order. *See* App. 7a, 12a-14a. Judge Haynes explained that the proposed plan for further relief – though vacated by Judge Nixon – will be "put[ ] . . . on the table as something that th[e] Court is willing to consider." App. 134a; *see also* App. 13a (focusing upon "the proposed plan that reflects the Special Master's [and] his assistants' report on an appropriate remedial plan"); App. 8a-9a (referencing October 22 order as basis for further proceedings). In short, Judge Haynes stated that he intended to ensure retention of "the acquired knowledge that [the OSM has] accumulated in [its] work." App. 100a; *see also* App. 112a.

Moreover, Judge Haynes has expressly relied upon the vacated October 22 finding of noncompliance to shift the burden of proof on the issue of compliance with the consent decree onto the State. *See, e.g.*, App. 8a-10a. When Petitioners' counsel pointed out that the order "has since been vacated," Judge Haynes interrupted, "Well, it was vacated not on the merits. . . . I don't want your remarks to be construed in any way that that plan was set aside because the Court didn't believe in the substance of it."

App. 133a; *see also* App. 133a, 138a (Judge Haynes "didn't want to leave anybody with the impression that [the October 22 order] was vacated on the merits and found unacceptable in some way."). Finally, while Judge Haynes ruled that the former special master and experts will be available for deposition concerning their proposal for further relief, Petitioners have been prohibited from asking any questions about the *ex parte* communications with the court that gave rise to the proposal. *See* App. 13a.

3. Petitioners petitioned the court of appeals for a writ of mandamus directing (i) disqualification of the special master and experts and suppression of the tainted fruits of their *ex parte* communications in the case (including, most importantly, their findings of noncompliance and proposal for further relief), or in the alternative, (ii) at least discovery into unknown facts about their conduct *ex parte* in this case.

On June 8, 2006, a panel summarily denied the petition without questioning Petitioners' showing of bias on the part of the OSM. The panel concluded that the issue of bias was immaterial: because Petitioners had not shown that the former special master and experts "were or are acting in a quasi-judicial capacity," the special master and experts were not subject to the rules prohibiting judicial bias. App. 3a. The panel also held that Judge Nixon's recusal cured any remaining harm. Although it acknowledged Petitioners' concern that Judge Haynes continued to rely upon the findings of noncompliance proposed *ex parte*, the panel held that "these matters are now all of record and can be litigated by the parties." App. 3a.

4. The day after the Sixth Circuit summarily denied Petitioners' mandamus petition, the D.C. Circuit granted a

writ of mandamus in an indistinguishable case, reaching precisely the opposite result on precisely the same issues. *See In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006). Accordingly, Petitioners sought rehearing and rehearing *en banc*, emphasizing that "the circuits are squarely split on issues going to the heart of the integrity of the federal judiciary and its officers, and th[e Sixth Circuit], we respectfully submit, is on the wrong side of that split." The court of appeals denied rehearing and rehearing *en banc* on September 29, 2006.

REASONS FOR GRANTING THE WRIT

THE RULING BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS, AND WARRANTS THIS COURT'S SUPERVISORY INTERVENTION TO PROTECT THE INTEGRITY OF THE JUDICIAL PROCESS.

The central premise of the four-paragraph unpublished order of the court below is that the former special master and experts are not subject to 28 U.S.C. § 455 and other norms requiring impartiality of federal judicial officers "because [Petitioners] have not shown that [members of the OSM] were or are acting in a quasi-judicial capacity." App. 3a. That troubling legal conclusion squarely conflicts with the contrary ruling of the D.C. Circuit in *Kempthorne*, and it substantially conflicts with the rulings of other circuits in closely analogous cases. Particularly in view of the direct threat to the integrity of the federal judiciary posed by a ruling permitting such court-appointed officials to be *biased*, this Court's review is warranted. Indeed, the Court may wish to consider summary reversal in this case.

1. While the Sixth Circuit rested its ruling upon its conclusion that the special masters and experts were not quasi-judicial officers subject to the rules against judicial bias, neither the Respondents nor either of the district judges below ever questioned, let alone denied, the quasi-judicial (at least) nature of the OSM's functions. Indeed, Judge Haynes acknowledged that the special master and his experts "were quasi-judicial officers," App. 127a; *see also* App. 103a, and with good reason. They crafted, at the direction of and in *ex parte* consultation with Judge Nixon prior to his recusal, detailed fact-findings, extensive legal conclusions, and sweeping remedial recommendations, all of which were communicated *ex parte* to, and provisionally ordered by, the trial judge.

The Respondents in the D.C. Circuit's decision in *Kempthorne*, however, *did* contend that the special master in that case was not subject to disqualification under Section 455 because he had been tasked only with "finding the facts in the first instance and making a 'report and recommendation detailing his findings and conclusions.'" *Kempthorne*, 449 F.3d at 1269 (citation omitted). The D.C. Circuit made short work of the issue: The special master's "role in assessing allegations of misconduct plainly demonstrates the adjudicative nature of [the] position." *Id.* (internal quotation omitted). That court explained that a special master who is charged "with finding the facts in the first instance and making a 'report and recommendation detailing his findings and conclusions,'" and who plays a "role in assessing allegations of misconduct," "plainly [is in an] adjudicative . . . position" and is, in fact, "functionally indistinguishable from . . . a trial judge." *Id.* at 1269 (citations and internal quotations omitted).

The clear dictate of governing rule and canon is to precisely the same effect. *See* FED. R. CIV. P. 53 (master may not "have a relationship . . . that would require disqualification of a judge under . . . § 455," absent parties' valid consent); 2003 Advisory Committee Note to FED. R. CIV. P. 53 ("Masters are subject to the Code of Conduct for United States Judges"); *Code of Conduct for United States Judges*, Canon 3 § (B) (specifying canons' applicability to masters).

The D.C. Circuit's ruling is in keeping with every relevant decision from every other circuit that has addressed the subject. We have found no authority supporting, or tending to support, the rule adopted by the court below that a judicially appointed officer performing these functions need not be impartial. To the contrary, the courts of appeals have uniformly insisted that special masters performing similar functions must be unbiased. *See Edgar v. K.L.*, 93 F.3d 256, 260-62 (7th Cir. 1996) (issuing writ of mandamus compelling recusal of district court judge where court-appointed investigative "experts" had "become partisans [and] carrie[d] an unacceptable risk for compromising impartiality," and thus could "no longer claim the mantle of judicial appointment," with its "special weight" of "presumed neutrality"); *see also In re Gilbert*, 276 U.S. 6, 9 (1928) ("When respondent accepted appointment as master he assumed the duties and obligations of a judicial officer."); *In re Kensington Int'l, Ltd.*, 368 F.3d 289 (3d Cir. 2004) (issuing writ of mandamus requiring recusal of district court judge based, in part, upon the appearance of bias by court-appointed special advisors); *Cobell v. Norton*, 334 F.3d 1128, 1144 (D.C. Cir. 2003) (disqualifying monitor appointed as special master because that was "a judicial role" and he had developed "significant prior knowledge

. . . on the basis of which he had formed and expressed opinions of continued relevance to the litigation"); *Gary W. v. Louisiana Dep't of Health and Human Servs.*, 861 F.2d 1366, 1369 (5th Cir. 1988) ("[Special master] was performing a quasi-judicial function when . . . she submitted her formal recommendation."); *Universal Oil Prods. Co. v. Hall*, 76 F.2d 258, 262 (8th Cir. 1935) ("quasi judicial function[s]" of a master include making "findings of fact and conclusions of law" and preparing a "master's report").

Although the First Circuit has questioned whether special masters and experts should be held "to the strict standards of impartiality that are applied to judges," it is anything but indifferent to showings of *bias* on their part. *Morgan v. Kerrigan*, 530 F.2d 401, 426-27 (1st Cir. 1976). Similarly, although the Second Circuit has held that a judicially appointed monitor who did not "find[ ] facts that would be binding on the court absent clear error" was not a special master "exercis[ing] quasi-judicial power" in the specific context of the Prison Litigation Reform Act and its unique prescription, it has not remotely suggested that it would be indifferent to a showing of *bias*. *Handberry v. Thompson*, 446 F.3d 335, 346 (2d Cir. 2006) (citing *Benjamin v. Fraser*, 343 F.3d 35, 45 (2d Cir. 2003)). The Sixth Circuit stands alone in this regard.

2. It bears emphasis that the court of appeals did not question (nor could it, as we demonstrate below) Petitioners' showing of actual or apparent bias by the special master and his experts. Rather, the panel held that *it did not matter* whether they are biased because they were not, and are not, "quasi-judicial officers." As noted above, every other court of appeals to consider the question has held that a special master who resolves disputed merits issues by proposing findings of fact and injunctive relief for

adoption by the district court is a "quasi-judicial officer" subject to the core requirements of impartiality and the absence of actual or apparent bias. If left undisturbed, the panel's ruling imperils the integrity of the federal judicial process, licensing district courts within the Sixth Circuit to appoint and retain special masters who suffer an otherwise disabling bias.

These concerns are all the more pronounced given the high-profile nature of this case in Tennessee, where it has received extensive news coverage. As the Report of the Committee on Judicial Conduct recently observed, this is precisely the sort of rare instance in which "misconduct allegations . . . are in the public eye" and any "de-emphasis of the misconduct problem" by the judiciary can be most damaging. The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, at 1, 108 (Sept. 2006) ("Report of Committee on Judicial Conduct"). In such cases, "the public is especially likely to form a view of the judiciary's handling of all cases on the basis of these few." *Id.* at 5. For these reasons, wholly apart from the circuit split created by the decision below, this Court's supervisory intervention – either through plenary review or by summary reversal – is warranted.

3. The appearance, and indeed the fact, of impropriety and partiality in this case are palpable. First, the former special master and experts effectively served as conduits to Judge Nixon, relaying the concerns of unspecified "concerned advocates," and presumably Respondents' counsel themselves (whom the special master's office was authorized to consult *ex parte*), regarding contested merits issues, *see* App. 158a-159a; and they did so *ex parte* and surreptitiously, without affording Petitioners any opportunity to respond. Second, one of the special master's experts,

Sara Rosenbaum, who had served as *Respondents' expert* in an earlier stage of this case, freely and extensively communicated to the court (unbeknownst to Petitioners) Respondents' position that the State was out of compliance with the consent decree, drafting memoranda to Judge Nixon that read much like a brief from opposing counsel. *See* App. 198a. Third, one need look no farther than the OSM's extraordinary proposal for further relief itself to grasp the overt, partisan bias that suffuses it, *see* App. 33a-69a; once it is read alongside the ensuing revelations concerning its *ex parte* formulation, the appearance of bias spills over into public view. Fourth, in the face of Petitioners' motion for discovery into the substance and dimensions of the *ex parte* communications, Respondents themselves moved to vacate the order proposing sweeping remedial measures, for the avowed purpose of mooting Petitioners' inquiry into the OSM's role. Fifth, Judge Nixon recused himself, also for the avowed purpose of mooting any further inquiry into the OSM's *ex parte* communications with him.

Again, as a direct result of the *ex parte* communications, Judge Nixon found the State noncompliant and provisionally adopted the OSM's sweeping remedial proposal. Although Judge Nixon's October 22 order was later vacated, Judge Haynes has persistently invoked that order to justify action against the State. Moreover, Judge Haynes has appointed the OSM to continue to serve, employing the fruits of its "acquired knowledge" under Judge Nixon. App. 100a, 112a. What is more, Judge Haynes has directed the OSM to champion its proposal for further relief, as appended to the vacated October 22 order, for his consideration. These circumstances are inimical to the public's perception of fairness and propriety in this proceeding. *Cf.* Report of Committee on Judicial Conduct, at 108 ("The

comparatively high proportion of problematic terminations of high-visibility complaints . . . could send the message to persons who believe they have a valid complaint that filing it will do no good because it will not be adequately investigated.").

The Sixth Circuit's holding that the tasks assigned to and performed by the OSM, however those tasks might be characterized, may properly be performed by a person who has a partisan bias in the outcome of the case has troubling implications, to say no more. As noted previously, the OSM had throughout its existence freely engaged in *authorized ex parte* communications with Respondents' counsel (as well as Petitioners'), and the record and course of proceedings in the court below contain disturbing indications that the OSM served as a conduit to the trial court for the advocacy of the views of the Respondents and/or their partisans. If the trial court had simply cut out the middle man and secretly installed the Respondents' counsel themselves as the court's *ex parte* advisors, nothing in the letter or logic of the ruling below would prevent the successor judge from continuing to call and rely upon Respondents' counsel as his "technical advisors."

4. The panel's separate holding that the fruits of the improper *ex parte* communications need not be suppressed immediately also warrants this Court's attention. According to the court below, "Although the petitioners argue that the current district judge has reaffirmed findings that were based on the August 2004 status report of the special master that was submitted *ex parte* to the court, these matters are now all of record and can be litigated by the parties." App. 3a.

Once again, the ruling court below places the Sixth Circuit in direct conflict with the D.C. Circuit's ruling in *Kempthorne*. There, the court of appeals issued a writ of mandamus ordering immediate suppression of the special master's reports from the point of his disqualification onward because "only suppression can ensure neither the Respondents nor the district court will rely upon the reports in the future, to the detriment of the 'public's confidence in the judicial process.'" 449 F.3d at 1271 (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)); *see also Ballard v. Commissioner*, 429 F.3d 1026, 1032 (11th Cir. 2005) (ordering Tax Court to "strike" report tainted by improper collaboration between judicial and quasi-judicial officers and reassign the case to new untainted judge); *Estate of Lisle v. Commissioner*, 431 F.3d 439, 440 (5th Cir. 2005) (same). As the D.C. Circuit previously explained in an analogous context, it blinks reality to assume (as the panel below has) that impermissible bias, after infecting the district court record, might later be cleanly identified and stripped away on appeal. *See Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (citing and quoting *Berger v. United States*, 255 U.S. 22, 36 (1921)).

Under the reasoning of the court of appeals' ruling, the findings, remedial proposals, and other work product of a biased special master, even one who has *in fact been earlier disqualified for bias*, may nonetheless continue as part of the record, to shape and color ensuing proceedings, so long as their merits "can be litigated by the parties."

* * *

We respectfully submit that vital norms protecting the integrity of the federal judiciary and its officers have been

imperiled by the decisions below. A strong showing of actual and apparent bias on the part of the special master and experts has been made, including the revelation of their patently improper series of *ex parte* communications with the trial judge in which they surreptitiously (and successfully) urged partisan views upon him over a period of months. While that revelation led to the trial judge's recusal in order to stave off further inquiry, the special master and experts continue to serve and to shape these proceedings, without any regard for, or inquiry into, their past and continuing actual and/or apparent bias. The grave importance of these matters to the public, the State of Tennessee, and the federal judiciary deserve more solicitude, and we respectfully submit that this case specially warrants the attention of this Court. "The public would . . . benefit[ ] from an investigation and resolution of this highly visible controversy." Report of Committee on Judicial Conduct, at 78.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the Court may wish to consider summary reversal.

Respectfully submitted,

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No. 06-5566

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: M.D. GOETZ, JR., Commissioner, Tennessee Department of Finance and Administration; J.D. HICKEY, Deputy Commissioner Bureau of TennCare; VIOLA MILLER, Commissioner, Tennessee Department of Children's Services, Petitioners.	)	ORDER (Filed Jun. 8, 2006)

Before: SILER, DAUGHTREY, and ROGERS, Circuit Judges.

The petitioners, the defendants in this action challenging certain aspects of TennCare (the medicaid program administered by the State of Tennessee), petition for a writ of mandamus directing the district judge to disqualify a former special master and seven experts now appointed to serve as technical advisors or to permit discovery concerning certain *ex parte* contacts between these individuals and the prior presiding district judge. The petitioners also seek to disqualify one of the newly-appointed monitors based on a conflict of interest. They move for leave to exceed the 30-page limit for mandamus petitions set forth in Fed. R. App. P. 21(d) and suggest that this petition is related to and should be considered by the panel that decided two appeals in *Rosen v. Tenn. Comm'r of Fin. & Admin.*, No. 98-627 (M.D. Tenn.), a separate TennCare action. The plaintiffs oppose the suggestion that this petition is related to the *Rosen* appeals. The district judge has filed a short response and notes that in

his opinion this case is related to the *Rosen* case. Because the mandamus petition arises from a different district court action and involves dissimilar issues, it will not be treated as related to the *Rosen* appeals.

"The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. It cannot be used to control a district court in the exercise of discretionary duties." *In re Am. President Lines, Ltd.*, 929 F.2d 226, 227 (6th Cir. 1991) (order) (citations omitted). Mandamus review generally is confined to matters of usurpation of judicial power or clear abuse of discretion. *Schlagenhauf v. Holder*, 379 U.S. 104, 111 (1964). A party seeking mandamus must have no other means of obtaining the relief he desires and must demonstrate a "clear and indisputable" right to that relief. *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976).

A party has the right to the recusal of a federal judge or magistrate judge when the judge "has personal knowledge of disputed evidentiary facts," 28 U.S.C. § 455(b)(1), or when the judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). A district judge's *ex parte* communications with a court-appointed master, monitor, or expert that involve or may involve matters at issue in the litigation can result in the judge gaining "personal knowledge of disputed evidentiary facts" requiring recusal. *See In re Brooks*, 383 F.3d 1036, 1041-43 (D.C. Cir. 2004); *United States v. Craven*, 239 F.3d 91, 101-04 (1st Cir. 2001); *Edgar v. K.L.*, 93 F.3d 256, 258-61 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997). The prohibition against obtaining personal knowledge of disputed facts set forth in

§ 455 has been applied to a special master or a court-appointed monitor serving in a quasi-judicial capacity. *See In re Brooks*, 383 F.3d at 1044-46; *Cobell v. Norton*, 334 F.3d 1128, 1139-45 (D.C. Cir. 2003).

The petitioners have not demonstrated a clear and indisputable right to the disqualification of the technical advisors because they have not shown that they were or are acting in a quasi-judicial capacity. The recusal of the district judge with whom the alleged *ex parte* communications occurred convinces us that rulings in this case will not be based on information that may have been communicated to the prior judge that has not been placed on the record and which the parties have not had the opportunity to challenge. Although the petitioners argue that the current district judge has reaffirmed findings that were based on the August 2004 status report of the special master that was submitted *ex parte* to the court, these matters are now all of record and can be litigated by the parties. We also conclude that the petitioners have not demonstrated a clear right to the disqualification of the newly appointed monitor based on her participation as counsel in another action against the state.

The petitioners' motion to exceed the page limit is **GRANTED**; the petition for a writ of mandamus is **DENIED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green Jr.
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN B., et al. individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	3:98CV0168 JUDGE HAYNES
DAVE GOETZ, Commissioner, Tennessee Department of Finance and Administration, et al.	)	
Defendants.	)	

ORDER

(Filed April 18, 2006)

Upon the review if the response of Richard Carter, M.D., M.P.H., former Special Master and recently appointed technical advisor to Plaintiff's motion for order regulation of discovery of former Special Master and his experts, (Docket Entry No. 635), the Court instructs the former Special Master and his assistants that they are now technical advisors who will perform the same duties, except as witnesses. They shall no longer report to or communicate with the Court, but must be prepared to testify on their studies in their assigned areas. They will be compensated by the defendants and may submit vouchers for payment for their services. For any additional information, any such request should be made through the lead monitor Susan Kay, pending further Order of the Court. The Court will inform the former Special Master and his assistants of when they should be prepared to

present their findings. In the interim, the former Special Master and his assistants shall cooperate with the Court's monitors in providing any information requested.

The Clerk shall mail a copy of this Order to the former Special Master at the address listed on his response for distribution to his assistants.

It is so **ORDERED**.

ENTERED this the 18th day of April, 2006.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN B., et al. individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	3:98CV0168 JUDGE HAYNES
DAVE GOETZ, Commissioner, Tennessee Department of Finance and Administration,; et al.	)	
Defendants.	)	

ORDER

(Filed February 15, 2006)

In light of the Plaintiffs' request (Docket Entry No. 595) citing among other things the the immediate need for the selection of a monitor and in contemplation of the appointment of monitors in this action to replace the Special Master and his assistants appointed by the Honorable John T. Nixon, Senior Judge, the Court invites the following persons to attend the February 28, 2006 conference at 10:00 a.m.:

1. Leilani S. Boulware, General Counsel, Meharry Medical College;
2. Professor Alex Hurder, Vanderbilt School of Law;
3. Professor Susan Kay, Vanderbilt School of Law;
4. Michael Passino; and
5. Robert L. Smith, Smith, Hirsch, Blackshear & Barnes, PLC.

The parties may comment on the appointment of these persons and either jointly or separately, may recommend other persons for appointment. Any such recommendations shall be filed by February 21, 2006.

These persons will be asked of their availability to serve individually or collectively as court appointed monitors in this action. If these persons elect to accept the Court's invitation to discuss their appointment, each such person is requested to read the Consent Decree, the Court Orders and Memoranda. (Docket Entry Nos. 12, 227, 291, 465, 578 and 584). The Clerk shall make copies of each of these documents and mail the documents to each of the above listed persons and any other person recommended by a party.

The Court will provide a protocol for the monitors' duties. In sum, the monitors will be assigned the principal responsibilities of monitoring the Defendants' compliance with the Consent Decree in designated areas; identifying issues and the reasons therefore, to direct the parties' and the Court's inquiry; and filing any reports that the monitors deem necessary. The monitors shall be allowed access to interview any Plaintiff, class member, employee of the Defendants, the Special Master and his assistants. The monitors shall be authorized to have access to any non-privileged documents and to request the production of any non-privileged documents that the monitors deem necessary to perform their assigned duties. Any reports from the monitors will be reviewed *de novo*. The parties may recommend other responsibilities or limitations for these monitors' services.

The monitors shall communicate with the Court only by written reports, but may communicate with the parties,

their counsel and the former Special Master and his assistants under an Order of confidentiality. Consistent with Judge Nixon's prior Order, (Docket Entry No. 270), any discussions between these monitors and any persons involved in this action shall be deemed confidential; shall be inadmissible as evidence in this action; and shall not be publicly disclosed without the consent of all affected persons. Absent a specific showing of extraordinary circumstances and Order of this Court, the monitors shall not be subject to discovery or to be called as witnesses. *Gary W. v. State of Louisiana, Dept. of Health and Human Resources*, 861 F.2d 1366, 1368-69 (5th Cir. 1988).

These monitors will serve in a quasi-judicial capacity pursuant to an appointment Order of this Court under the inherent authority of the Court to appoint persons to assist the Court in the performance of its judicial duties. *Ex Parte Peterson*, 253 U.S. 300, 312 (1920); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 743 (6th Cir. 1979). This member of the Court agrees with and adopts Judge Nixon's earlier Order finding the necessity for the appointment of persons to assist the Court on the Defendants' non-compliance with the Consent Decree and the Orders of this Court. (Docket Entry Nos. 227 at pp.36-46 and 228).

As pertinent here, in this almost eight year old action, the record reflects that Judge Nixon found in 2001, three years after the Consent Decree, the Defendants had not met the screening goals set in 1998. (Docket Entry No. 227, Findings of Fact and Conclusions of Law at p. 13). On October 22, 2004, Judge Nixon found that after six years under the Consent Decree: "The Court is not convinced that Defendants, acting on their own, will reach full compliance with the terms of the consent decree within a

reasonable period of time. As the health and well-being of 550,000 children is at stake, something more must be done to ensure that the State's EPSDT requirements are met in accordance with the terms of the Consent Decree. . . . [T]o date, the State has not achieved compliance with the terms of the Consent Decree." (Docket Entry No. 465, Memorandum Order at p.6).

The appointment of these new monitors is deemed necessary and appropriate given the Defendants' prior and repeated assertions of the potential disqualifications of the Special Master and his assistants from this action. See Docket Entry Nos. 475, 476, 511, 560, 562, 567 and 577. These collateral disqualification issues are diverting the parties from what Judge Nixon identified as the "one goal" in this action "to provide the underserved children of Tennessee the entire spectrum of medical benefits to which they are entitled under federal law" (Docket Entry No. 584, Order at p.4). Citing the "urgent need to improve healthcare for the children of Tennessee", Judge Nixon found that "no substantive activity has occurred in this case since November 2004; it is imperative that the parties now turn their attention to the merits of this case" because "the healthcare of Tennessee's children must come first." *Id.* at p 5.

With these findings and the suspension of proceedings from November, 2004, until December 13, 2005 (Docket Entry No. 558), I agree with Judge Nixon's observations on the need for monitors and to expedite this action to provide medical care for children, as required by federal law.

These monitors shall be compensated by the Defendants whom this Court has found to be not in compliance

with the Consent Decree and the Orders of this Court. *Reed*, 607 F.2d at 743-44. Any such compensation shall be reasonable and shall be determined by the Court pursuant to Local Rule 13(e). *See Reed*, 607 F.2d at 44.

It is so **ORDERED.**

ENTERED this the 15th day of February, 2006.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN B., et al. individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	3:98CV0168 JUDGE HAYNES
DAVE GOETZ, Commissioner, Tennessee Department of Finance and Administration,; et al.	)	
Defendants.	)	

ORDER

(Filed February 14, 2006)

The Court set a conference in this action on February 10, 2006 to discuss pending motions and the issues about the role of the Special Master in this action in light of the Order of recusal by the Honorable John T. Nixon, Senior District Judge. (Docket Entry No. 584).

After comments of counsel for the parties and a review of the Orders and Memoranda in this action, the Court finds it necessary and appropriate to set forth the following schedule and conditions for the resolution of the issues of the Defendants' compliance with the Consent Decree and this Court Orders in this action. The Court incorporates by reference its review of Judge Nixon's prior Orders, Memoranda, findings, and the provisions of the Consent Decree at the February 10th conference. It is therefore **ORDERED** that:

(1) Within thirty (30) days from the February 10, 2006 conference the Defendants shall file any documents which the Defendant contends, represents their remedial plan of compliance.

(2) The parties may commence discovery immediately on the status of the Defendants' compliance of the Consent Decree and this Court's Orders as well as the status of any plan or process of the Defendants to do so.

(3) Within twenty (20) days of this Order, the Defendants shall produce the documents listed in the Plaintiffs' counsel's motion. (Docket Entry No. 592, at p. 16, Section C through p. 17 up to and including paragraph 5).

(4) Within twenty (20) days of this Order, the Defendants shall produce the information requested by the former Special Master as set forth in his letter December 21, 2005 to State's counsel that is attached to the Defendants' motion. (Docket Entry No. 562).

(5) The parties shall have at least ninety (90) days from the date of the February 10th conference to conduct and complete discovery.

(6) To avoid collateral issues from interfering with the resolution of the Defendants' compliance; to meet the urgent medical care needs of the children, required by the Court's Orders, the Consent Decree and federal law, and to avoid the waste of resources, the current Special Master is relieved of his duties as Special Master, but shall remain and is **APPOINTED** as a technical advisor for this non-traditional litigation under the inherent authority of this Court. *Ex Parte Peterson*, 253 U.S. 300, 312 (1920) and *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 743 (6th Cir.

1979). This appointment extends to the persons selected by the Special Master who prepared or contributed to the proposed remedial plan submitted by the Special Master. *Id.*

(7) Under the Court's inherent authority and consistent with Fed. R. Civ. P. 27(a)(2), in addition to the proposed plan that reflects the Special Master's or his assistants' report on an appropriate remedial plan, within twenty (20) days of the entry of this Order, the former Special Master and his assistants shall provide the parties with:

a. a list of all documents reviewed for their contribution to the proposed plan.

b. a list of any exhibits upon which the former Special Master or his assistant would use to testify about their reasons for their contributions to the plan.

c. all publications of the Special Master and his assistants as well as a list of any cases in which they testified as an expert witness within the last ten (10) years.

(8) In the discovery of the Special Master, the Special Master assistants or any employee, or agent or officer of any party, there shall not be any inquiry on the following subjects:

a. any communications between the Special Master or any of his assistants and Judge Nixon. *Gary W. v. State of Louisiana Dept. of Health and Human Resources*, 861 F.2d 1366, 1368-69 (5th Cir. 1988); and

b. Any communication by any employee or agent of either party with the Special Master or any of his assistants in expectation of confidentiality based upon the Order of this

Court, but this restriction shall not extend to any public comments, statements or testimony of any such person.

(9) At an appropriate time, the Court will appoint a monitor(s) for this litigation with prior notice to the parties and a statement of the monitor(s)' authority.

(10) An evidentiary hearing will be held on June 19, 2006 at 10:00 a.m. on the Defendants' compliance with the Consent Decree and this Court's Orders. Although the Defendants contend that they are in compliance with the Consent Decree and this Court's Orders, given this Court's prior findings and conclusions of the Defendants' non-compliance with the Consent Decree and this Court's Orders (Docket Entry Nos. 227, 228, 275, 291, 465, 578 and 584) and this Court's reservation of a finding whether the Defendants should be held in contempt, the Court concludes that at that hearing, the Defendants shall have the burden of production that their efforts comply with the Consent Decree and this Court's Orders. See *United States v. Rylander*, 460 U.S. 732, 757 (1983); *Electrical Workers Pension Trust Fund of Local Union #58, IBEW v. Gary's Electric Service Co.*, 340 F.3d 373, 378, 383 (6th Cir. 2003).

Given the length of these proceedings and the absence of an approved remedial plan, the Court will undertake and the parties and their counsel should undertake efforts to expedite the resolution of the issues in this action.

It is so **ORDERED.**

ENTERED this the 14th day of February, 2006.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN B., et al., by their next friend, L.A., DUSTIN P. by his next friend, Linda C.; BAYLI S. by her next friend, C.W.; JAMES D. by his next friend, Susan H.; ELSIE H. by her next friend, Stacy Miller; JULIAN C. by his next friend, Shawn C.; TROY D. by his next friend, T.W.; RAY M. by his next friend, P.D.; ROSCOE W. by his next friend, K.B.; JACOB R. by his next friend, Kim R.; JUSTIN S. by his next friend, Diane P.; ESTEL W. by his next friend, E.D.; individually and on behalf of all others similarly situated,	)	No. 3:98-0168 Judge Nixon
Plaintiffs,	)	
v.	)	
DAVE GOETZ, Commissioner, Tennessee Department of Finance and Administration; MANNY MARTINS, Deputy Commissioner, Bureau of Tenncare; and VIOLA MILLER, Commissioner Tennessee Department of Children's Services,	)	Case reassigned to Judge Haynes.
Defendants.	)	

MEMORANDUM ORDER

(Filed February 3, 2006)

Pending before the Court is Defendants' Renewed Motion For Discovery From The Special Master And Experts Concerning *Ex Parte* Communications With The Court And Motion For Reinstating The Moratorium On The Special Master's Activities (Doc. No. 560) ("Defendants' Discovery Motion"), to which Plaintiffs responded in opposition (Doc. No. 567), and Defendants have further replied (Doc. No. 574). Also pending is Defendants' Motion To Expedite Consideration Of The State's Motion To Reinstate The Moratorium On The Special Master's Activities (Doc. No. 562) ("Defendants' Motion to Expedite"), to which Plaintiffs have responded (Doc. No. 573).

This action was filed on February 25, 1998 on behalf of all individuals under the age of twenty-one, "who are or will be enrolled as beneficiaries of TennCare, Tennessee's Medicaid Managed Care program." (Doc. No. 12 ¶1, at 2.) The action challenged the adequacy of children's health services provided by TennCare and the Tennessee Department of Children Services ("DCS"). In particular, Plaintiffs alleged that the State failed to fulfill early periodic screening, diagnosis and treatment ("EPSDT"), as required by 42 U.S.C. §§ 1396a(a)(43), 1396d(a) and (r). "The purpose of EPSDT is to ensure that underserved children receive preventive health care and follow-up treatment." (Doc. No. 227 at 5.) Shortly after the complaint was filed, the parties submitted, and the Court approved, a Consent Decree through which the State could achieve and maintain compliance with EPSDT requirements. (Doc. No. 12.) Defendants were given the flexibility to craft, with input from Plaintiffs, a Remedial Plan and a Serious Risk Plan to increase compliance with EPSDT

requirements, both of which were adopted and incorporated into the Consent Decree. (Doc. Nos. 57, 58, 59, 60.)

Notwithstanding these efforts, in December 2001 in response to a motion to show cause by Plaintiffs, the Court found that the State had "failed to ensure compliance with all aspects of the EPSDT mandate. . . ." (Doc. No. 227 at 26.) Concluding that holding the State in contempt or imposing monetary sanctions would not be in the interests of justice, the Court appointed Special Master Richard A. Carter, M.D., M.P.H., to mediate and confer with the parties to develop a plan that would bring the State into compliance with EPSDT requirements and the Consent Decree. (Doc. No. 227 at 36-46.)

Unfortunately, on August 14, 2002, the Court concluded that "the Special Master's mediation efforts have not produced a consensus among the parties regarding a revised or enhanced plan for achieving EPSDT compliance." (Doc. No. 291 at 2.) "Nevertheless, in light of [the Court's] . . . concern about the State's inability to provide mandated healthcare services to its under-21 TennCare population" (*id.*), the Court revised the Special Master's role "to facilitate [and assess the State's] compliance with the Consent Decree and EPSDT law." (*Id.* at 3.) The Court stated it would "periodically measure the State's adherence to the terms of EPSDT law and the Consent Decree . . . [and would be] guided by the Special Master's input. (*Id.* at 4-5.)

Two years later in yet another response to Plaintiffs' complaints that Defendants continued to violate the terms of the Consent Decree and EPSDT requirements, the Court again refrained from holding Defendants in contempt. (Doc. No. 465.) Instead, the Court noted in its

October 22, 2004 Order that it would "'look to the future' instead of looking to the past through contempt proceedings," so as to ensure that EPSDT needs of the children enrolled in TennCare would be met as quickly as possible. (*Id.* at 3, 8.) With the children's best interests in mind, the Court instructed the Special Master to create a comprehensive plan to achieve compliance with the Consent Decree and EPSDT requirements. (Doc. No. 465 at 8.) The Court provided a copy of the Special Master's proposed plan to the parties, permitted them to review it, file objections, engage in discovery to obtain additional facts about the proposed plan, and submit comments and suggestions to the plan. (*Id.* at 8.) After reviewing and, if necessary incorporating, the parties' comments, the Court intended to implement the new plan. (*Id.*) Defendants immediately attacked the plan due to their perception that it was based on improper *ex parte* communications between the Court and the Special Master, and sought discovery of such communications. (Doc. No. 475.)

In the interim, due to the State's fiscal crisis, this case was held in abeyance while the Court could determine the issues raised in the companion TennCare case *Grier v. Goetz*, No. 3:79-3107 (M.D. Tenn.). Upon restarting this case, both Plaintiffs and Defendants proposed that the Court vacate its October 22, 2004 Order, which the Court did in a December 13, 2005 Order (Doc. No. 558). In light of this Court's decision to vacate the October 22, 2004 Order, the Court found Defendants' initial discovery motion to be moot, and denied it without prejudice. (*Id.* at 3.) Defendants immediately filed their current Discovery Motion.

Without taking into account the October 22, 2004 Order, the history of this case reveals that this Court has

consistently found the State to be in violation of the Consent Decree and EPSDT requirements. Indeed, the State's own documents show that they are not in compliance with the terms of the Consent Decree. (*See* Doc. No. 546 at 1 (showing that even in 2004 the State is below screening targets that should have been achieved in 2001).) Notwithstanding this repeated finding, the Court took the unusual path of not holding the State in contempt or imposing monetary sanctions. Instead, the Court has attempted to steer this case away from needless and acrimonious litigation, and focused on fashioning a solution that would increase compliance with the Consent Decree and federal EPSDT requirements. This constructive approach has been fueled by one goal: to provide the underserved children of Tennessee the entire spectrum of medical benefits to which they are entitled under federal law.

The State's pending Discovery Motion attempts to push this goal to the wayside and refocus the case on wholly unnecessary, time-consuming, costly, and highly divisive litigation. I refuse to condone a path that will waste resources and time in the face of the urgent need to improve healthcare for the children of Tennessee. Importantly, no substantive activity has occurred in this case since November 2004; it is imperative that the parties now turn their attention to the merits of the case. Accordingly, and after much consideration, I have decided to *sua sponte* recuse myself from this case to remove any barrier – perceived or real – to the ultimate goal of increasing the State's compliance with EPSDT requirements. Let it be clear, however, that my recusal in no way adjudicates the merits of, or reflects an opinion on the allegations contained in, Defendants' Discovery Motion. Rather, it is a

reflection of my view that the healthcare of Tennessee's children must come first.

Thus, I hereby **RECUSE** myself from the above-styled case, and direct the Clerk of the Court to reassign it to another United States District Court Judge in the Middle District of Tennessee. In light of my recusal, Defendants' Discovery Motion and Defendants' Motion to Expedite are **DENIED** as **MOOT**.[1] Pending reassignment of the case, the Office of the Special Master shall remain intact, but **INACTIVE**. The new presiding Judge may decide the continuing necessity of the Office of the Special Master, and all motions pending at this time.

It is SO ORDERED.

Entered this the 3rd day of February, 2006.

/s/ John T. Nixon
JOHN T. NIXON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

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[1] In their Discovery Motion Defendants requested a copy of Doc. Nos. 489, 490, 491, 492, 493, 494, which were filed by this Court under seal out of an abundance of caution to maintain the parties' confidentiality. The Court believes that the parties already have a copy of these documents, which are the Special Master's proposed plan attached to this Court's October 22, 2004 Order, the Special Master's August 2, 2004 Report, and Resumes for the Experts retained by the Special Master, respectively. In the event the parties believe they do not have a copy of these documents, they may request a copy from the Clerk of the Court.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN B., by his next friend, L.A., et al.)
DUSTIN P. by his next friend, Linda C.;)
BAYLI S. by her next friend, C.W.;)
JAMES D. by his next friend, Susan H.;)
ELSIE H. by her next friend, Stacy Miller;)
JULIAN C. by his next friend, Shawn C.;)
TROY D. by his next friend, T.W.;)
RAY M. by his next friend, P.D.;)
ROSCOE W. by his next friend, B.W.;)
WILLIAM B by his next friend, K.B.;)
JACOB R. by his next friend, Kim R.;)
JUSTIN S. by his next friend, Diane P.;)
ESTEL W. by his next friend, E.D.;) No. 3:98-0168
individually and on behalf of all others) Judge Nixon
similarly situated,)
)
Plaintiffs,)
)
v.)
)
NANCY MENKE, Commissioner,)
Tennessee Department of Health;)
THERESA CLARKE, Assistant Com-)
missioner, Bureau of Tenncare;)
GEORGE HATTAWAY, Commissioner)
Tennessee Department of Children's)
Services;)
)
Defendants.)

ORDER

(Entered November 24, 2004)

Pending before the Court is Plaintiff's Motion to Temporarily Suspend Proceedings in order to Facilitate Negotiations, (Doc. No. 482), filed with an accompanying

memorandum (Doc. No. 483). The court has reviewed the motion and memorandum and hereby orders that all proceedings in this case are suspended until January 17, 2005.

It is SO ORDERED.

Entered this the 23rd day of November, 2004.

/s/ John T. Nixon
JOHN T. NIXON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN B., by his next friend, L.A., et al.)
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ESTEL W. by his next friend, E.D.;) No. 3:98-0168
individually and on behalf of all others) Judge Nixon
similarly situated,)
)
Plaintiffs,)
)
v.)
)
NANCY MENKE, Commissioner,)
Tennessee Department of Health;)
THERESA CLARKE, Assistant Commissioner, Bureau of Tenncare;)
GEORGE HATTAWAY, Commissioner)
Tennessee Department of Children's Services,)
)
Defendants.)

MEMORANDUM ORDER

Before the Court is Plaintiffs' Motion for Further Relief (Doc. No. 454) and supporting memorandum (Doc.

No. 455), to which Defendants have responded (Doc. No. 458). For the reasons stated herein, the Court hereby GRANTS Plaintiffs' Motion for Further Relief in part. The Court DENIES the conditions that Plaintiffs proposed for Defendants within their Motion for Further Relief.

I. BACKGROUND

This case was initiated in 1998 on behalf of a plaintiff class of 550,000 TennCare enrolled children. The suit sought declaratory and injunctive relief enforcing these children's rights under federal law to receive Early and Periodic Screening, Diagnosis and Treatment ("EPSDT"), for medical, mental, or developmental disorders.

The Consent Decree approved by the Court (Doc. No. 12) granted declaratory and injunctive relief on Plaintiffs' EPSDT claims, enjoined the defendant state officials from depriving Plaintiffs of EPSDT services and prescribed a detailed, multi-year remedial plan for ensuring compliance with the EPSDT mandate.

In January 2001, Plaintiffs filed a motion to show cause why Defendants should not be held in contempt of court for failing to comply with the terms of the Consent Decree. After a three week hearing on Plaintiff's motion, the court issued Findings of Fact and Conclusions of Law (Doc. No. 227), concluding that Defendants were not in compliance with the terms of the Consent Decree. The Court appointed Special Master Richard Carter, M.D., M.P.H., to supervise the implementation of an EPSDT-compliant plan.

Then, on June 16, 2004, Plaintiffs again filed a Motion to Show Cause (Doc. No. 403), claiming that Defendants

have continued to violate the terms of the Consent Decree for EPSDT, and also claiming that Defendants have failed to comply with this Court's Memorandum Order of August 14, 2002, in which it ordered the State to provide the Special Master with an initial Work Plan ("IWP") and the Itemized Assessment Protocol ("IAP") (Doc. No. 291). The Court, at a scheduling conference held on August 9, 2004, outlined a process that would "look to the future" instead of looking to the past through contempt proceedings. In suggesting that the Plaintiffs file a Motion for Further Relief, the Court denied the Plaintiffs' Motion to Show Cause.

Plaintiffs have filed a motion for further relief and supporting brief (Doc. Nos. 454, 455), requesting that the Court direct the Special Master and his experts to develop a proposed remedial plan to bring Defendants into compliance with the Consent Decree. Within their motion, Plaintiffs propose the that Court impose certain conditions on Defendants in return for staying contempt proceedings initiated by Plaintiffs' earlier Motion to Show Cause (Doc. No. 403). The Court hereby DENIES Plaintiffs' proposal that conditions be attached to the Special Master's remedial plan. Should the Court approve a remedial plan after review and comment by Defendants and Plaintiffs, Defendants will be obligated to follow its terms in an effort to finally achieve compliance with the Consent Decree already in place. Should Defendant choose not to comply with the terms of such a plan, Plaintiffs will then be in a position to assert anew their Motion to Show Cause.

II. FINDINGS OF FACT

After a thorough review of the Special Master's reports and the depositions taken in response to Plaintiffs' motion to Show Cause, the Court has made the following findings of fact. The State has made some inroads towards compliance with the requirements of the Consent Decree. The Special Master, in his latest status report to the Court, noted several encouraging activities and events. The State has formed Work Groups with the help of the State's EPSDT Consultant Dr. Henry Ireys which are linked to Committee Structures. The Special Master reports having observed the beginnings of departmental interchange and communication. Also, the State has formed a TennCare/Tennessee Chapter of American Academy of Pediatrics ("TNAAP") Advisory Committee ("TTAC") to receive the reports of Screening Guidelines Committee ("SGC") and the Provider Relations and Educational Workgroups. Additionally, the governor, with Blue Cross-Blue Shield and Vanderbilt University financing, commissioned the two part McKinsey Report which contains many potentially valuable ideas for solving TennCare's financing problems. In terms of screening rates, the Special Master reported to the Court that the State has made some improvements, as well.

On June 23, 2004, Plaintiffs deposed Dave Goetz, Tennessee Commissioner of Finance and Administration, and on June 24, 2004, Plaintiffs took the deposition of Manny Martins, Deputy Commissioner of Finance and Administration of TennCare (Doc. No. 420). Both deponents attested to the sincerity, good intentions, and hard work of those state employees who have labored since 2001 to comply with EPSDT. Mr. Martins testified that that State is making inroads in the area of outreach.

"From 1999 to 2003, we had a 175 percent increase, I believe, in our screening rates from, as an example, 19.8 percent to 53 percent. We've had a 60 percent increase in our dental screening rates – 55, 56 adjusted – the raw is 36 to 62, for 2002 raw 54, adjusted 41.9." Martins Dep. 57. Mr. Martins also reported that TennCare has staffed 22 dental clinics, and has contracted with the Department of Health for dental outreach, dental operatory, and mobile operatory. *Id.* Mr. Martins stated that by way of a new contract with the Department of Health for $7 million, effective July 1, 2004, every single TennCare enrollee child would be contacted by their local health department from newly set up call centers. He also attested to the fact that TennCare hired a dental director and a medical director, both of whom have large responsibilities in EPSDT. *Id.*

Mr. Goetz also made statements in his deposition which conveyed progress. With respect to screening results, Mr. Goetz noted "dramatic improvements" over the last couple of years and stated, "efforts to work through the county health offices have borne fruit, and that's also what we were funding, continuing outreach in the budget that was just passed into law." Goetz Dep. at 41. Nonetheless, while some progress has been made since the court's approval of the Consent Decree in 1998, testimony from Mr. Martins and Mr. Goetz, along with reports made to the Court by the Special Master, make clear that not enough progress has been made. The court is not convinced that Defendants, acting on their own, will reach full compliance with the terms of the consent decree within a reasonable period of time. As the health and well-being of 550,000 children is at stake, something more must be done to ensure that the State's EPSDT requirements are met in accordance with the terms of the Consent Decree.

As recently as August 2004, the Special Master concluded in his status report to the Court that no feasible plan yet exists to achieve compliance for an indispensable section of the Consent Decree. The Special Master reported that the State has failed to honor its renewed commitment to produce an IAP satisfactory to the Special Master, last made in September 2004, and still refuses to engage its key officials in planning efforts to achieve compliance, verification of the quality of its data, and evaluation of the successes or failures in attaining compliance.

The Special Master also reports that the State is incapable of reporting progress to the Court because it lacks a valid and reliable system of measuring progress in such key areas as provider network adequacy, case management, outreach, the effective use of information systems, and system level coordination, to name a few. The Special Master's status report informs the Court that because Defendants have never created a list of precise "outcomes" towards which their efforts are focused, not only have they failed to meet the terms of the Consent Decree, but they are not even in a position to be able to assess their own shortcomings for the purpose of making improvements.

The Court finds that the deposition testimony of Mr. Goetz and Mr. Martins conclusively support this Court's finding that, to date, the State has not achieved compliance with the terms of the Consent Decree. Mr. Martins, the senior state official with direct responsibility of EPSDT compliance, testified, "I'm not sure that compliance with the consent decree is achievable." Martins Dep. at 29. He testified that the 100 percent screening requirement for children in state custody mandated by the Consent Decree "should

be achievable," and that the Consent Decree's stated dental screening rate "can be achievable over a period of time." Martins Dep. at 33. When asked about barriers to compliance that he saw, Mr. Martins replied, "There are numerous external barriers that are out there. Some of them involve coordination with other departments, some of them involve the inability to have good data in terms of being able to have information on the system – on the child and following that child through the system." Martins Dep. at 35. Mr. Martins also discussed socio-economic barriers to achieving compliance with the consent decree and "barriers in understanding" on the part of families of TennCare enrolled children who sometimes do not seek services for their children when they are healthy, in spite of the importance of preventative EPSDT measures to the continuing health of their children. Martins Dep. 35-26. Finally, Mr. Martins stated, "I think we have barriers from the standpoint of not totally understanding all the gaps that we have in our delivery systems." Martins Dep. at 36.

Specifically with respect to the screening requirements in the Consent Decree, Mr. Martins testified that the State is not meeting the 80 percent standard established in the Consent Decree. Martins Dep. at 166. Mr. Martins testified that while he would like to review the numbers, the last figures he had seen indicted that the State is not meeting the 100 percent screening requirement under the Consent Decree for children who are in state custody. Martins Dep. at 166. Further, Mr. Martins stated that with respect to dental screening and dental service, the State is not in compliance with the Consent Decree. *Id.* Other areas of particular concern testified to by Mr. Martins include the current inadequacy of behavioral

health networks (Martins Dep. at 183), and the State's failure to meet the Consent Decree's required provision of EPSDT services to the children in DCS custody. Martins Dep. at 187.

Mr. Goetz testified that one factor that impedes implementation of the Consent Decree is the sheer enormity of the task, given the 550,000 children enrolled in TennCare. Goetz Dep. at 37. He also testified to learning that breakdowns in communication have also created barriers to the State's ability to achieve compliance with the terms of the Consent Decree. Goetz, Dep. at 37.

III. CONCLUSION

This is not a finding that the State acted in bad faith or has intentionally failed to comply with the Consent Decree. To the contrary, the Court acknowledges, as set forth above, that the State has made progress towards compliance in some areas. However, these efforts have not produced the results mandated by the Consent Decree six years ago. The Court is compelled to grant further relief to the Plaintiffs, 550,000 TennCare enrolled children, to ensure that their EPSDT needs are met as quickly as possible. Accordingly, Plaintiffs' motion for further relief is well-taken.

As stated above, a motion for further relief looks to the future, rather than to the past. In looking to the future, the Court has instructed the Special Master and his experts to create a comprehensive plan to put the State into compliance with the terms of the Consent Decree. The plan is attached to this Order as Attachment A. This plan is not a modification of the terms of the consent decree. Rather, it has been fashioned by the Court through the

Special Master and his experts as a means of enforcing the Consent Decree already in place.

Initially, the parties shall have fifteen (15) working days from the entry of this order to review the plan and file any objections with the Court. Then, the court shall conduct a scheduling conference on Monday, November 15, 2004 at 1:00 p.m., for the purpose of setting a date for the parties to depose the Special master and his experts, jointly, regarding the plan. At this scheduling conference, the Court shall also set a deadline for the parties to submit additional modifications or improvements to the plan.

Reports prepared by the Special Master and relied upon by the Court in the issuance of this Order shall be made available to the parties upon their request. At the close of the post-deposition comment period, the Court shall review the comments and suggestions submitted by the parties and shall make a final determination as to the content of the plan to be instated.

It is SO ORDERED.

Entered this the 22nd day of October, 2004.

/s/ John T. Nixon
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Proposed Remedial Plan for Further Relief

I. Introduction; Organization of this Order

A. This Order of Further Relief establishes revised procedures and timelines for ensuring Defendants' adherence to the provisions of the Consent Decree dated March 12, 1998. This Order creates no new substantive rights in the plaintiff class, nor does it create new substantive obligations on the part of Defendants. The revised Consent Decree implementation procedures and timelines set forth in this Order for Further Relief are aimed at achieving measurable compliance with all terms of the Consent Decree.

B. The provisions set forth in this Order follow the sequence of the Consent Decree and not necessarily the order of importance for specific Consent Decree mandates.

C. This Order consists of two parts, a narrative and Gantt/PERT Charts. While these charts provide specific direction, the court recognizes that additional steps or modifications by Defendants may be necessary to achieve specific outcomes. In instances where either document apparently differs, the Court will resolve the differences.

D. All provisions set forth follow the same general process:

1. For each section (and in some cases, for specific paragraphs) of the Consent Decree, this Order outlines measurable outcome performance standards that the Court will utilize to determine the extent to which Defendants are in compliance with specific terms of the Consent Decree.

2. A Gantt/PERT chart plan sets forth timelines for sequences of activities as well as interim performance milestones; these milestones will both measure performance and provide a means by which Defendants will be able to achieve certain performance outcomes.

3. The court will consider Defendants to be in full compliance with the terms of the Consent Decree when they can demonstrate that they are able to achieve and maintain the outcome performance standards which are outlined in this Order of Further Relief, for a full federal fiscal year.

4. Defendants will specify work breakdown structures (WBS) and will assign sufficient resources and staffing as may, in the view of the Court, be necessary to both achieve each performance standard within the timelines set forth in the corresponding Gantt/PERT Chart as well as properly measure progress toward each performance standard.

5. Within the timelines set forth in each Gantt/PERT Chart, Defendants will submit for review by the Court the progress reports called for by each performance standard and by the relevant provisions of this Order. Upon review of the underlying evidence and data on which Defendants base their progress reports, the Court may accept, reject, or modify Defendants' progress reports and measures of progress as appropriate.

6. Defendants will provide the Court with reports which compare their actual performance against the standards set forth in this Order; submissions will occur on a quarterly,

semi-annual, or annual basis, as identified in the Order.

7. In preparing the progress reports detailed in this Order, Defendants will first submit draft versions of each report, along with relevant tables, graphs, and analyses of performance compared to each Standard in question, to the Consent Decree Governance body (¶83 "Commissioners Task Force" and currently "The Governor's EPSDT Coordinating Committee"). The Governance body shall review each draft progress report and, where appropriate, correct or modify the progress report and issue Corrective Action Plans (CAPs) as needed to ensure conformity with this order.

8. Defendants' will submit to the Court reports, reviewed and modified as appropriate by the Governance Body, along with Corrective Action Plans prepared by the Governance Body, for final review, acceptance, rejection, or modification.

9. The Court will Hold Status Hearings on a quarterly basis to (a) assess Defendants' overall compliance with the terms of the Consent Decree and this Order, (b) consider requests which may be made by either Plaintiffs or Defendants for revision of timeline or performance standard, or (c) adjudicate any other relevant matters.

E. Sections IV B. (Medical Necessity Standard) and Section IV C. (Payment) specify certain immediate modifications in current practices that in the Court's view are essential to achieving the standards and obligations set forth in the Consent Decree.

F. The Special Master will oversee the timely implementation of this Order for the Court.

G. Outcome performance standards that the Special Master finds to be unachievable despite application of adequate resources will be modified after a Status Hearing.

II. Outreach ¶39-40

A. Within one month, Defendants will submit to the Court a plan for operating their Tennessee Department of Health (DOH) Outreach Call Center. The Plan will achieve the interim outcomes enumerated in the accompanying Gantt/PERT chart under CALL CENTER.

B. Within one month, Defendants will submit to the Court a plan for operating their DOH Community Outreach Programs. The Plan will achieve the interim outcomes enumerated in the accompanying Gantt/PERT chart under COMMUNITY OUTREACH PROGRAM.

C. The CMS 416 non-participating ratio (NPR) (100 minus CMS 416 participating ratio: item 10, multiplied by 100) will decrease each FFY Quarter until it reaches and stabilizes at less than or equal to 20 percent during or before FFY07.

D. The CMS 416 age-category percentages of new periodic screens performed on new or renewing enrollees (NEW) within their first expected periodicity interval, will increase each FFY Quarter until it reaches and stabilizes at or above 80 percent during or before FFY07.

E. All children in legal or physical custody will achieve outcomes of less than 5 percent non-participation ratios (NPR) and greater than 95

percent new enrollee-new screen rates (NEW) during or before FFY07.

F. Children in Consent Decree defined as special, non-utilizing family, or "at risk" subpopulations, will achieve the CMS 416 NPR, NEW, Call Center and Community Outreach Center ratios or rates denoted above in II A, through D.

III. Screening ¶41-52

A. Within one month of the entry of this order, recently completed periodicity schedules that have meet [sic] the following criteria will be disseminated to all participating TennCare Providers. These schedules will begin at birth and continue through age 21 and will have been formally reviewed and approved by relevant health professions expert organizations in the state. They will address all required elements of: (a) periodic screening to assess the existence of physical, mental, emotional, behavioral and developmental health conditions, (b) dental care; (c) vision examinations; and (d) hearing examinations. Periodicity schedules shall be accompanied by written materials, which shall clarify that no prior authorization is necessary for screens or dental, vision, and hearing examinations and that interperiodic screens and treatments are to be available as needed without authorization.

B. Within one month of the entry of this order, Defendants will submit to the Court standardized screening and tracking instruments for periodic screens, vision care, dental care, mental health and hearing care. The instruments shall be accompanied by draft instructions for the use of each instrument. Both the instruments and usage instructions must have been formally reviewed

and approved by relevant health professions expert organizations in the state prior to submission to the Court. Such draft instructions shall be written to ensure that primary care providers and dental providers are informed of their responsibility for referral and follow-up and are furnished with all relevant information detailing the services and supports available to ensure follow-up including transportation, scheduling assistance, and medical case management. Screening instruments, together with instructions for their use, will be distributed to all prime contractors, sub-prime contractors, and relevant providers, as well as to health department screening sites following approval. The instruments must be capable of capturing and recording each required element of a periodic screen including dental referral as well as other information which permits the tracking of children with suspected physical, mental, emotional and behavioral, developmental, or dental health conditions. The design of the screening instruments must ensure that required screening elements (medical, dental, hearing and vision), diagnoses, and referrals can be readily tracked using the Defendants' electronic management information system (SMIS), which must be capable of being electronically linked to TC claims.

C. Assuming that prior methods for measuring APSP are demonstrated to be valid and thus a reliable baseline of progress to date, Defendants shall achieve the following screening rate benchmarks:

1. By the final day of Federal FY 2005, the state is to achieve an APSP of 60% and a DSP of 60%;

2. By the final day of Federal FY 2006, the state is to achieve an APSP of 70% and a DSP of 70%;

3. By the final day of Federal FY 2007, the state is to achieve an APSP of 80% and a DSP of 80%.

If errors are discovered which, in turn, serve to lower Defendants' previously reported screening levels, the Court will consider a request to adjust the targets accordingly.

D. For purposes of calculating DSP, the numerator shall be the total number of children ages 3 through twenty years who receive any dental service during the designated year ("children served") and the denominator shall be the total number of children, ages 3 through twenty years, who were enrolled in Medicaid for any period of time during that year ("children enrolled"). Consistent with CMS 416 reporting requirements, TennCare will also report the raw numbers used to calculate this total DSP as well as age-specific DSP and raw numbers of children served and children enrolled for each of the following age groupings: <1, 1-2, 3-5, 6-9, 10-14, 15-18, 19-20. Also consistent with CMS 416 reporting requirements, TennCare shall additionally report total and age group-specific DSP rates and raw numbers for "preventive dental services" and "dental treatment services" as defined by CMS.[1] For consistency and temporal trend analysis, TennCare shall report the above DSP rates and

[1] http://www.cms.hhs.gov/medicaid/epsdt/416inst.asp, (at items 12a, 12b, and 12c)

raw numbers for each year starting with FFY 1996 ("baseline" year).

E. Defendants will undertake Medical Record Reviews (MRR) as a component of the APSP and TennCare's quality assurance systems. MRR will be conducted within six months and at least annually thereafter under written protocols that ensure they are rigorous, valid and reliable. Selection of providers and records will be conducted on a randomized basis (using cluster sampling as necessary to reduce MRR expenses) with notification of providers to be given no earlier than two weeks prior to a site visit. Records are to be selected at random from a list of John B class children with records at the provider site. Identification of sample case records for review is to occur at the time of the visit and not announced in advance. Reviews will include:

1. An assessment of consistency with the periodicity and content schedules, including record notation of dental referrals.

2. Review of the content of the services provided compared with written clinical protocols established by the providers and available to the reviewers. The protocols should be based on standards of practice in the community or guidelines of a medical professional or government organization, and reviewed and approved by the medical director of the practice or the equivalent at least annually. In the absence of such protocols, a Court approved protocol for screening along with disease-specific protocols for children are to be used. The State protocol is to be reviewed and approved by the State

EPSDT Professional Advisory Committee within 6 months and annually thereafter.

F. Within six months of entry of final order: Defendants shall offer a continuing education program for providers who furnish EPSDT screening and referral or related services. The program shall consist of periodic oral and written communication methods and shall be aimed at prime contractors, sub-contractors, all EPSDT relevant screening and dental network providers. The program will be designed to instruct all participating health care providers and MCOs and their sub-contractors regarding the importance of periodic and inter-periodic screens, the role of the screening instrument, referrals to dentists and to specialists as needed for diagnostic and treatment services, and how network screening and dental providers can secure assistance from MCOs and other relevant prime and sub-prime contractors in carrying out their screening, examination, referral and treatment responsibilities.

IV Diagnosis and Treatment ¶53-62

A. **Referrals: ¶ 53** Defendants shall ensure that children can be appropriately referred from one level of screening or diagnosis to another more sophisticated level for diagnosis as needed to determine the child's physical health, behavioral health and developmental needs.

1. Within two weeks of the entry of this order, Defendants shall submit to the Court the exact method used to calculate CMS Item 11 – Total Eligibles Referred (TER) for FFY02, FFY03 and FFY04 from claims database.

2. Defendants shall develop a Medical Record Review Protocol for validating Item 11, TER, and submit the protocol to the court for review, acceptance, rejection, or modification.

3. The Referral Medical Record Review will demonstrate that 90% of CMS Item 11 referrals for FFY04 occurred as claimed and will be used to validate or adjust the CMS 416 report for FFY04.

4. The Referral Medical Record Review will demonstrate that 90% of children referred by PCPs or other providers achieved visits to the requested specialist or dental provider within 21 calendar days per Special Terms and Conditions.

B. **Immediate Relief with respect to the Medical Necessity Standard, and Development and Use of Prospective and Concurrent Utilization Review Procedures, Consistent with the Consent Decree.**

1. Until Defendants have successfully (in the view of the Court) implemented the procedures set forth in Part IV, Defendants and their agents shall treat as approved, and shall ensure prompt coverage and payment for, each diagnostic or treatment service and procedure which falls within the benefits and service categories enumerated in 42 U.S.C. §§ 1396d or 1396(r) and which is recommended by a child's treating, referring or consulting health professional. During this interim time period, coverage under TennCare shall be based solely on the clinical

recommendations of the child's treating, consulting, or referring health professional, and without further review of the necessity of treatment by the TennCare program or its agents. During this interim time period, Defendants may submit to the Court for review and determination any case (along with all supporting evidence upon which Defendants rely) in which Defendants believe that adhering to the clinical recommendations of the treating, consulting, or referring health professional would be against the best short-term or long-term physical, mental, or developmental health interests of the child. Defendants and their agents shall further treat all requested treatments as constituting a covered service unless they are able to demonstrate to the satisfaction of the Court that coverage for a particular clinically recommended treatment or service request falls outside the definition of medical assistance under 42 U.S.C. §1396d(a) and (r). Covered treatments and services enumerate in §§1396d(a) and (r) include but are not limited to: diagnostic services, services of licensed health care institutions, pharmaceutical benefits, dental benefits, preventive, rehabilitation, developmental treatment for emotional and behavioral disorders, developmental delays, case management and all health care furnished by licensed physicians or health professionals.

2. Payment for recommended diagnostic and treatment services described in this part shall be made promptly, in accordance with applicable payment standards under federal law, the Consent Decree, and Paragraph IV

C of this part. This automatic coverage and payment rule shall remain in effect until the Court approves a medical necessity standard of review and a coverage determination process which together meet the elements of the medical necessity standard and utilization review requirements contained in the Consent Decree.

3. Defendants shall immediately notify (through the use of written instructions) all contractors, health professionals and institutions and suppliers participating in any TennCare provider network, and all agencies and programs involved in the provision of social, educational, health care or other services for TennCare-enrolled children, regarding this order of coverage and its obligation to promptly cover and pay all diagnostic and treatment services without further utilization review. Defendants shall issue written instructions to TennCare contractors and agents to treat all clinically recommended diagnostic and treatment services as approved. The Court shall review and approve all written instructions to be sent to contractors, agencies, and other organizations whose notice is required under this paragraph.

4. Within 10 days of entry of final order: Defendants shall submit for court review a draft medical necessity standard which incorporates all of the elements of the consent decree at ¶¶ 55-61.

5. Within 10 days of Court approval of a revised medical necessity standard, Defendants shall submit a draft coverage determination and utilization review process, which meets all of the requirements of Consent Decree Paragraph 55.

6. The draft coverage determination and utilization review process shall apply to any circumstance under which medical judgment must be exercised in order to reach a determination of coverage, regardless of whether the medical judgment relates to a determination regarding whether a particular treatment is covered at all under TennCare, or if covered, whether such treatment is medically necessary for a specific child.[2]

7. The draft coverage determination and utilization review process will specify that no individual without relevant expertise and experience in matters of medical judgment involving the specific aspect of pediatric health care under review (i.e., physical, mental, developmental, or dental) will be authorized to make a determination regarding whether a particular recommended diagnostic or treatment service is covered at all or, if covered, whether such treatment is

[2] For example, TennCare excludes cosmetic surgery. In the case of a child with a cleft palate, the medical judgment which must be exercised is a determination as to whether there are *any* circumstances under which such surgery falls within TennCare parameters at all (i.e., is medically indicated) or is excluded as cosmetic. The second level of review would determine whether such covered surgery is medically necessary for a particular child. Defendant's procedures shall ensure that the review process is used for both levels of coverage determination.

medically necessary for a particular child within the meaning of the Consent Decree.

8. Under no circumstances will Defendants permit TennCare contractors to conduct coverage determinations or utilization review in any case involving a TennCare enrolled child until Defendants certify to the Court, and the Court so finds, that the contractor's utilization review process meets the following elements:

   a. The process provides for completion of an internal review process in no more than 14 calendar days (excluding time needed for additional information requests) for a normal review, and more than 72 hours in the case of an expedited review request, and same-day review for diagnostic or treatment requests considered to be urgent by the treating, consulting, or recommending clinician. The term "expedited review request" means any request in which the treating, consulting, or referring provider indicates that the child could suffer adverse physical, mental, dental or other health consequences if recommended diagnosis or treatment is delayed.

   b. The process uses a standard of review which places the burden of proof on the Defendants and its agents to justify the denial, reduction, or termination of a recommended diagnostic or treatment service. This allocation of the burden of proof presumes that requested diagnosis or treatment services will be covered

based on the child's clinical record and the recommendations of the treating, referring or consulting professionals in the exercise of their clinical judgment. It means further that if a contractor or TennCare seeks to deny, delay, reduce, or terminate care or otherwise adversely affect care, it may do so in any particular case only it if is able to justify in writing the rejection of the treating, consulting, or recommending professional's opinion using relevant, valid, and reliable evidence specifically identified by TennCare or the contractor as part of a written, detailed utilization review decision beginning at the initial determination stage. TennCare or its contractor shall make available to both the child's parents or caregiver and the treating, recommending, or consulting provider a complete copy of all valid, relevant, and reliable evidence relied on in the utilization review process. As used in this order, the term relevant, valid and reliable evidence encompasses published, peer reviewed results of scientific studies, impartial expert opinions, and expert consensus statements developed by government agencies or private professional and healthcare organizations which have no financial or material interest in any particular TennCare contractor.

c. The process, beginning at its initial determination stage, produces written coverage determination which sets forth the initial reviewer's findings, a

detailed explanation of the evidence on which the reviewer bases the decision (regardless of whether the decision relates to coverage at all or the medical necessity of a particular covered treatment procedure), a detailed explanation regarding how the recommended treatment or service does not in fact achieve the prevention or amelioration of the effects of the child's physical, mental, emotional and behavioral, developmental, or dental condition, and a complete explanation of the alternative diagnostic or treatment procedure which the reviewer does recommend.

9. Within 10 days of the Court's approval of Defendants' revised coverage determination and utilization review procedures, Defendants shall disseminate the Court-approved medical necessity standard revised utilization review process to all TennCare contractors currently or potentially engaged in utilization review. Under no circumstances shall Defendants permit a contractor to institute a utilization review process until the Defendants certifies [sic] to the Court that the contractor has the capacity to comply with every aspect of the review process and the medical necessity standard and the Court makes findings to this effect. Defendants' medical necessity standard and utilization review process also shall be posted as a TSOP at its TennCare Internet website. The Court shall approve the TSOP before posting.

10. Within one month of Court approval of the medical necessity standard and utilization review procedures, the Defendants shall

modify all managed care contracts which are in effect (including sub-prime contracts and provider agreements) to include the Court approved medical necessity standard as well as the Court-approved utilization review procedures.

11. Within 10 days of the Court's approval of the TSOP, Defendants shall mail the TSOP to every health care provider, every child welfare agency, every local public health agency, local education agency, child care program, every parent, caretaker relative, or foster or special needs adoption family, the state's Protection and Advocacy Agency, and every other governmental entity with health care related responsibilities for children. The Defendants shall develop a dissemination scheme and process to present to the Court for prior approval no later than the date the Court receives the TSOP for its review and approval.

12. Defendants shall supply the court with complete files within ten days of its action for all cases in which diagnostic or treatment services requested for a child are denied, delayed, reduced or terminated as part of the approved utilization review process. Defendants' submission shall be accurate, complete and formatted according to the standards, which the Court will provide at such time as the utilization review process is permitted to be reestablished for children.

    a. At a minimum, the data supplied to the Court shall contain the name and specific qualifications of the reviewer, the time frame in which the review was

requested and completed, patient specific data regarding all of the medical information relevant to the patient's case, the specific recommendations of the treating clinician, and the specific bases for the denial. The database shall be made available to the Court on the first day of the first quarter following the date on which the Court permits coverage determinations to commence and quarterly thereafter.

13. Within one month following initiation of the Court approved utilization review process by contractors and the TennCare program: Defendants shall have in place a revised External Quality Review Organization (EQRO) contract, whose purpose is to review Contractors' adherence to the revised medical necessity definition and review process. The draft contract shall be submitted to the Court for review no later than two weeks following the initiation of the Court-approved utilization review process by contractors and the TennCare program.

C. Immediate Relief Related to the Payment for Health Care (¶41 through ¶93)

1. Effective immediately, Defendants shall revise the payment rates for all EPSDT periodic and interperiodic screens, as well as all primary and specialized medical, mental health, behavioral, diagnostic, and treatment services which are furnished to children. A medical or health professional will be paid an amount no less than 85% of the payment, which will be made under the

2001 Medicare RBRVS[3] for the services and procedures in question.

2. No revisions of dental payment rates for EPSDT dental services are required at this time. However, dental payment rates will be annually adjusted on the anniversary date of the Doral ASO contract such that payments will be maintained at least at levels equivalent to the 75th percentile of procedure-specific usual and customary rates. If DSP targets as defined in section III C are not met, the Defendant's Governance Body will develop and submit to the Court for final review, acceptance, rejection, or modification a Corrective Action Plan that may involve financial and non-financial incentives, policies, and programs. If a final Corrective Action Plan fails in the view of the Court to adequately address the discrepancy between DSP performance and DSP targets, the Court will consider increasing payments annually by five percentiles until DSP targets are reached or the 100th percentile of usual and customary rates is reached.

D. Reviews of institutional quality: Defendants shall report quarterly on the quality of all TennCare-funded health care for children residing in medical institutions or any other out of home placement for 30 days or longer. Such reviews shall include both aggregated and individual case reviews and shall address utilization of primary, preventive, diagnostic and treatment

[3] For precedent refer to TennCare MCO Contract Risk Agreement July 2001, 2-3.n.2 page 45 or alternatively see MCO CRA at http://www.state.tn.us/tenncare/healthplans.html

services, the quality of case management services, the extent to which treatment plans are comprehensive and up to date, and the extent to which there is evidence that treatment received is consistent with the plan of care.

E. Defendants shall demonstrate compliance with the following measure of access:

1. Travel time to pediatric primary care and dental services does not exceed 30 minutes regardless of urban/rural location; and

2. Appointments for non-urgent pediatric specialty care visits and dental care visits must be available within 21 calendar days of request, and within 24 hours of request in the case of an urgent need.

F. Adverse event review: Defendants shall undertake a detailed medical record review of any adverse event involving a child enrolled in TennCare in which the accessibility or quality of health care might be an issue, including but not limited to any death (including a suicide), injuries inflicted during residence in a medical institution or other out of home placement, and emergency hospitalizations.

V. Specific Services ¶63-77

A. Within two months of the entry of this order, Defendants shall achieve the following measures related to access to specialty care:

1. Specialty referrals (to sources of both inpatient and outpatient health care) for the diagnosis and treatment of suspected physical, mental, or dental health problems can be completed within 21 calendar days of request

by a child's treating or referring or consulting health professional;

2. Case managers, certified and/or licensed by their respective health professions bodies, are supplied to families within 72 hours of request by a treating, consulting or referring health professional;

3. Laboratory and diagnostic services recommended by treating, consulting or referring health professionals are completed within 14 days;

4. Prescriptions are dispensed on the same day they are written or presented to a pharmacy.

B. Within two months of the entry of this order, Defendants will establish a system of oversight and enforcement capable of ensuring provision of non-emergency medical transportation services for all children in the John B class who request it (or on whose behalf the service is requested, by a parent, a legally responsible relative, a caregiver or guardian, or any agency or program involved in the provision of services to TennCare enrolled children). The non-emergency transport arrangement shall cover all periodic and as needed screening services, medical, dental and vision care, and all diagnostic and treatment services recommended by treating or consulting professionals. The system shall address transportation services for children residing either in their homes or in an out-of-home placement.

C. Within three months of the entry of this order, Defendants will develop new contracts for the currently funded Centers of Excellence (COE) that include provisions ensuring that the contractor is

willing to accept TennCare payment for any service, specialty care, hospital care, or outpatient care that the sponsoring organization offers to children, in general. Defendants shall submit the renegotiated contract to the Court for prior approval. In the event that Defendants are unable to successfully renegotiate the contracts with existing contractors to cover all TennCare-enrolled children, the Defendants shall reissue the contract, soliciting applications from providers other than the current ones. The alternative center shall be capable of serving children in its respective section of Tennessee who are determined by their treating or consulting providers to require specialized diagnostic or treatment services which, in the opinion of the treating or consulting professional, are not available in their community or are inadequate to meet their needs. In the event that an alternative agreement cannot be successfully negotiated in time to appropriately replace a current contractor and transfer all children enrolled in its program, Defendants shall submit a Corrective Action Plan to the Court for acceptance, rejection, or modification.

D. Within 12 months of entry of final order, Defendants shall have systems in place that ensure:

1. Continuity of care for children with suspected or diagnosed emotional and behavioral health conditions and other children with special health care needs requiring a range of outpatient and inpatient services, regardless of the child's status within the child welfare system or special education systems;

2. Maximum feasible parental involvement in decision making in the treatment of children

with emotional or behavioral conditions and other children with special health care needs;

3. Medically appropriate discharge planning will be effectuated, and;

4. Medically necessary case management services will be furnished.

E. Within 12 months of the entry of this order, Defendants shall demonstrate to the Court that case management is being provided as needed to all children and universally for each of the following groups of children:

1. Children with special health care needs, as defined under the State's Maternal and Child Health Title V program, to encompass as defined under the TennCare Program but at a minimum including any child who has an ongoing physical, emotional or behavioral, developmental, or oral health condition and requires health and related services of a type or amount beyond that required by children generally;

2. Children receiving child welfare services;

3. Children receiving special education or early intervention services;

4. Children receiving behavioral health services or services for dual diagnoses.

The demonstration shall detail:

a. the competencies and skills required of case managers;

b. the methods used for determining the adequacy of the supply of case managers, including the case manager/patient ratios used to measure adequacy;

c. the methods for recruitment and deployment of case managers;

d. The compensation arrangements Defendants uses [sic] with contractors and through interagency agreements with other state and local agencies to ensure appropriate financing of case management services, and;

e. the methodologies and data the Defendants uses [sic] to measure the appropriateness, timeliness and adequacy of case management services.

F. Defendants shall supplement population-wide performance measurement as described in VIII with in depth case review methods and interviews with families, treating and consulting providers, human service and education agency staff involved in the management and service delivery to children with special needs, regarding the overall functioning of the health care system for such children. The Defendants will use a research methodology that is capable of providing the Court with an accurate assessment of how the entire system of care functions for children with special health care needs. In designing this "ecological" measurement system Defendants will pay particular attention to specific chronic illnesses and conditions including oral conditions, which have been shown to be correctable or amenable to amelioration with proper coordination and management. Studies should be capable of tracking condition-specific cohorts of children

over time in order to provide the Court with longitudinal evidence of how the TennCare system addresses special needs.

VI. Other Services ¶78-83

A. Within two months of the entry of this Order and annually thereafter, Defendants shall submit to the Court an updated list of State agencies for which EPSDT coordination is appropriate and the corresponding Interagency Agreements of the participating agencies.

B. Each Interagency Agreement must specify:

1. The mutual objective and responsibilities of each party to the arrangement;

2. The services each party offers and in what circumstances;

3. The cooperative and collaborative relationships at the State level;

4. The kinds of services provided by local counterparts; and

5. Methods for the following:

a. Early identification of individuals under 21 needing health services;

b. Reciprocal referrals;

c. Coordinating plans for health services provided or arranged for recipients;

d. Payment or reimbursement methods;

e. Electronic exchange of reports of services furnished;

f. Periodic review and joint planning for changes in the agreements;

g. Continuous liaison between the parties, including designation of state and local liaison staff; and

h. Joint evaluation of policies that affect the cooperative work of the parties.

C. Within two months of the entry of this Order and annually thereafter, Defendants shall submit to the Court an updated list of statewide services available through State agencies noted in *Part VI.A.* above, for which coordination is appropriate.

VII. Coordination ¶84-93.

A. Within two months of the entry of this Order, Defendants shall submit a review protocol for validating that the Permanency Plan for TennCare children in DCS custody provides for the evaluation and treatment of behavioral and medical needs of children in custody.

B. Upon Court approval of the review protocol, DCS shall perform quarterly reviews of the Permanency Plans to demonstrate that 100% of children in State custody have received medically necessary behavioral and medical evaluations and, were or are being treated for their conditions prior to and after custodial placement.

C. Within one year of this Order, DCS shall establish a functioning medical passport card for all children in legal custody.

1. Within two months of this Order, a plan shall be submitted to the Court for implementing such a system and,

2. Within eight months of this Order, Defendants will demonstrate the efficacy of the system for selected children and,

3. Within ten months of this Order, Defendants will demonstrate the system's effectiveness using a random sample of children in custody selected by the Court.

VIII. Monitoring ¶94-103

A. Biannually, the Special Master shall assess TennCare's performance against performance under the State employee health plan and, in the case of pediatric dental care, against the experiences of children enrolled in the Delta Dental Plan of Tennessee using a common set of consumer based performance measures. Defendant will ensure that Children in the John B class will have performance outcomes related to primary health care at least comparable to those experienced by children enrolled in the state employee health benefit plan and for preventive and routine dental care at least comparable to those experienced by children enrolled in the Delta Dental Plan of Tennessee. Comparability shall be assessed using survey methods described below and the following domains from the Consumer Assessment of Health Plans Study (CAHPS) developed by the Agency for Health Care Quality and Research:

1. *Getting Needed Care*

2. *Getting Care Quickly*

3. *Health Provider Communication*

4. *Courteous and Helpful Office Staff*

5. *Health Plan Customer Service*

The specific survey questions to be used in each domain are shown in Attachment 1 to this order.

B. Biannually, the Defendants will achieve comparability across the consumer measures indicated in paragraph VIII A for children generally and also separately for children with special health care needs enrolled in TennCare and the state employee health benefit plan.

C. In addition, biannually, the Defendants will achieve comparability across the following consumer measures for children with special health care needs enrolled in TennCare and the state employee health benefit plan:

1. *Access to Specialty Services*

2. *Assistance in Obtaining Specialty Services for those with a problem*

The specific survey questions to be used in these domains are shown in Attachment 1 to this order.

D. Biannually, the Special Master shall commission consumer surveys of children enrolled in TennCare and children enrolled the state employee health plan and the Delta Dental Plan of Tennessee for purposes of establishing equivalency of performance.

E. In measuring access, satisfaction and quality for screening, diagnosis and treatment services as specified in items A, B & C above, standardized household survey instruments, created under the federally sponsored Consumer Assessment of Health Plans Study (CAHPS) will be used augmented with questions to be developed by the court that appropriately measure consumer perceptions of access, quality and satisfaction with

pediatric oral health care. Three survey questionnaires will be administered for this purpose: The CAHPS 3.0H Child Questionnaire, the CAHPS 3.0H Child Questionnaire with CCC Measurement Set, and a modified version of the CAHPS 3.0H suitable for measuring performance in dental care. The CAHPS 3.0H is a questionnaire designed to measure children's health care experiences generally. The CAHPS 3.0H CCC is designed to measure the health care experiences of children with special health care needs. The modified version of CAHPS 3.0H for Dental Care will be developed by OSM Experts for the purpose of measuring performance outcomes in dental care. The questionnaires are designed to be administered by telephone or mail. Survey questionnaires will be administered for a random sample of children in the John B class and for a random sample of children enrolled in the state employee health plan and the Delta Dental Plan. Surveys will be conducted at 12-month intervals to assess whether the state is meeting the performance outcomes described above. The survey methodology (mode of administration, sampling methods, samples sizes, data collection procedures and processing, and contractor qualifications) will be designed to produce valid and reliable comparison data. Once data are collected, composite scores for the domains described in paragraphs VIII A, VIII B and VIIIC will be calculated and compared between John B children and children in the state employee health plan. Composite scores for dental services will be calculated and compared between John B children and children enrolled in the Delta Dental Plan of Tennessee. Comparability of outcomes will be determined by the absence of statistically significant differences in the composite scores.

The Special Master shall commission analyses of the health care system performance for children enrolled in TennCare, the state employee benefit plan, and the Delta Dental Plan for purposes of establishing equivalency of performance.

F. Within six months of the entry of this order, Health Departments providing screening services and dental care to TennCare children will have an automated mechanism for tracking referrals based on those screens and dental visits, including the outcomes of those referrals in the health records of children they have seen.

G. Defendants shall undertake quarterly reviews of encounter data, and shall measure the extent to which encounters for specific physical, mental and dental conditions meet expected incidence and prevalence rates among the population of children. The Court's experts shall identify conditions and prevalence rates for measurement purposes.

H. State Management Information System (SMIS): Within six months, the Defendants will have developed an SMIS system that can rapidly and accurately produce consent decree outcome measures requested by the Special Master or Special Master Experts. The operational health information system will have, at a minimum, the following capabilities:

1. The ability to track the receipt of medical behavioral, and developmental screenings and dental examinations, diagnosis, treatment and case management services by individual children on a continuous basis from initial TennCare enrollment through the most recent disenrollment, across contractors,

sub-contractors, and agencies, and regardless of a child's living arrangement (i.e., in home or in an out-of-home placement);

2. The ability to analyze and report on the receipt of TennCare financed screening, diagnostic, and treatment services with respect to any covered medical, dental or behavioral health care service (including medically necessary case management). Reporting capabilities should be on both a population-wide basis and with respect to the following subpopulations: children in DCS custody; children with special health care needs; children receiving special education or early intervention services; and children receiving behavioral health services.

3. For screening, diagnostic and all covered treatment services;

   a. The ability to monitor and report on the sufficiency of provider networks in the areas of primary medical care, all recognized pediatric medical subspecialties, primary and specialized dental providers, allied health care professionals, and behavioral health providers.

   b. The ability to undertake special quality of care studies comparing the quality of care provided for selected acute and chronic physical, mental, developmental, and dental health conditions for specific sub-populations of children across both plans and provider networks within plans.

G. Within six months of the Order, the Defendants will submit to the Court lists of the top 30 children's mental and physical chronic conditions, including oral disease, by cost of services per year, by severity of disability, including mortality rates, and by multiple condition rates, MI/MR, etc. For each listed condition Defendant will indicate the known evidence-based or community standard evidence for prevention, cure, or amelioration with proper management. From these lists,

1. The Court for the purpose of monitoring amelioration and mitigation of their health status will identify cohorts of children with chronic conditions.

2. Using adequate expertise for the condition-cohorts chosen, achievable health status outcomes will be defined.

3. Using valid epidemiologic surveillance methods, cohort health status will progressively achieve the outcome levels defined.

4. For condition-cohorts who fail to achieve expected levels of health status, Corrective Action Plans will be submitted to the Court for acceptance, rejection, or modification.

VIII. Amendment of Contracts

A. In reviewing and approving the documents, plans, and other materials which are required of the Defendants and identified in this order, the Court will advise Defendants regarding which elements of the Order will require amendment of contracts. Within 2 weeks of Court approval of each plan, document or other required product, Defendants will submit to the court draft

contract amendments whose purpose is to bring all TennCare prime and sub-prime contracts into compliance with the terms of this Order which, in the Court's view, necessitate contract amendments. The revised contracts will be reviewed and approved by the Court and will take effect immediately upon the Court's approval.

B. Defendants will revise all TennCare contracts to specify access and performance duties and measures for all children with special health care needs who are enrolled with each contractor, as defined under Title V of the Social Security Act. The Court shall review contract revisions prior to amendment.

C. Revised contract terms shall address all elements of this order, including the provision of screening, diagnosis, treatment, case management, care coordination, scheduling and transportation, physical, behavioral health, and dental service networks, and centers of excellence services for children with special health care needs (CSHCN) as defined under Title V of the Social Security Act. Contractual duties shall apply to all CSHCN enrolled in TennCare, regardless of out of home or custodial status.

IX. Human Resources

A. Within 20 calendar days after the issuance of this Order the Defendants shall submit its list of human resources assigned by name, title, job description, resume, and percentages of time and hours allocated to the tasks assigned, that will ensure compliance with this Order for acceptance, rejection, or modification.

B. If, at any time, the Court is not satisfied that the Defendants are employing all of the necessary

human resources to accomplish the tasks within timeline set forward in this Order, the Court shall recruit, employ, and direct sufficient human resources to comply with the Order.

C. Until such time that the Court is satisfied that sufficient progress has been achieved by Defendants, the Special Master will be notified of and he or his representative will be invited to attend all EPSDT governance body meetings, all agency working committee meetings, and governance body staff meetings.

Attachment 1
CAHPS QUESTIONS

Getting Needed Care

- Since you joined child's health plan, how much of a problem, if any, was it to get a personal doctor or nurse you are happy with?
- In the last 6 months, how much of a problem, if any, was it to get the care, tests, or treatment for your child you or a doctor believed necessary?
- In the last 6 months, how much of a problem, if any, were delays in your child's health care while you waited for approval from your child's plan?

Getting Care Quickly

- In the last 6 months, when you called during regular office hours, how often did you get the help or advice you needed for your child?
- In the last 6 months, not counting times your child needed health care right away, how often did your

child get an appointment for health care as soon as you wanted?

- In the last 6 months, when your child needed care right away for an illness, injury, or condition how often did your child get care as soon as you wanted?
- In the last 6 months, how often was your child taken to the exam room within 15 minutes of your child's appointment?

Health Provider Communication

- In the last 6 months, how often did your child's doctors or other health providers listen carefully to you?
- In the last 6 months, how often did your child's doctors or other health providers explain things in a way you could understand?
- In the last 6 months, how often did your child's doctors or other health providers show respect for what you had to say?
- In the last 6 months, how often did doctors or other health providers spend enough time with your child?

Courteous and Helpful Office Staff

- In the last 6 months, how often did office staff at a [sic] your child's doctor's office, or clinic treat you and your child with courtesy and respect?
- In the last 6 months, how often were office staff at your child's doctor's office, or clinic as helpful as you thought they should be?

Health Plan Customer Service

- [Screener question]: In the last 6 months, did you look for any information about how your child's health plan works in written material or on the Internet? [yes, no]
- In the last 6 months, how much of a problem, if any, was it to find or understand this information?

Access to Specialty Services

- In the last 6 months, how much of a problem, if any, was it to see a specialist that your child needed to see?
- In the last 6 months, how much of a problem, if any, was it to get special medical equipment for your child?
- In the last 6 months, how much of a problem, if any, was it to get special therapy for your child?
- In the last 6 months, how much of a problem, if any, was it to get treatment of counseling for an emotional, developmental or behavioral problem for your child?
- In the last 6 months, how much of a problem, if any, was it to get your child's prescription medication?

Assistance in Obtaining Specialty Services for those with a problem

- Whether health plan or doctor's office helped when family experienced problems with obtaining special medical equipment.
- Whether health plan or doctor's office helped when family experienced problems with obtaining specialized therapies.

- Whether health plan or doctor's office helped when family experienced problems with obtaining counseling services.
- Whether health plan or doctor's office helped coordinate care among different providers for children with multiple providers.
- Whether health plan or doctor's office helped when family experienced problems with obtaining prescription medications.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHN B., by his next friend, L.A., et al. DUSTIN P. by his next friend, Linda C.; BAYLI S. by his next friend, C.W.; JAMES D. by his next friend, Susan H.; ELSIE H. by her next friend, Stacy Miller; JULIAN C. by his next friend, Shawn C.; TROY D. by his next friend T.W.; RAY M. by his next friend P.D.; ROSCOE W. by his next friend, B.W.; WILLIAM B by his next friend, K.B.; JACOB R. by his next friend, Kim R.; JUSTIN S. by his next friend, Diane P.; ESTEL W. by his next friend, E.D.; individually and on behalf of all other similarly situated, Plaintiffs, v. NANCY MENKE, Commissioner, Tennessee Department of Health; THERESA CLARKE, Assistant Commissioner, Bureau of Tenncare; GEORGE HATTAWAY, Commissioner Tennessee Department of Children's Services; Defendants.	)	No. 3:98-0168 Judge Nixon

MEMORANDUM ORDER

(Entered July 14, 2004)

Before the Court is Plaintiffs' Motion for Rule 706 Designation of the Court Expect Witnesses, and to Compel Defendants to Comply with Reporting Requirements (Doc.

No. 391) and supporting memorandum (Doc. No. 392), to which Defendants have responded (Doc. No. 416). For the reasons stated herein, the Court hereby DENIES Plaintiffs' Motion for Rule 706 Designation of the Court's Experts. The Court holds in abeyance Plaintiffs' Motion to Compel Defendants to Comply with Reporting Requirements.

I. BACKGROUND

On May 20, 2004, Plaintiffs filed a motion and supporting memorandum (Doc. Nos. 375, 376) requesting an evidentiary hearing on questions relating to the State's present compliance with the Consent Decree (Doc. No. 12).[1] In this motion Plaintiffs also requested that the parties be afforded immediate discovery as to the matters that were to be the subject of the hearing, and asked that the Court's experts, retained by the Special Master, be given immediate access by Defendants to any non-privileged information that they might reasonably need to enable them to testify at the hearing as to those matters. Plaintiffs also filed the motion to be addressed in this order, requesting Rule 706 designation of the Court's experts as witnesses for the evidentiary hearing originally scheduled by the Court for August 9, 2004. As ordered by this Court, Defendants filed an expedited response to Plaintiffs' motion for Rule 706 designation of the Court's experts and Plaintiffs' motion to compel Defendants to

[1] The Court has already set forth, in detail, the background of this case in its December 20, 2001 Memorandum and Order (Doc. Nos. 227, 228). Therefore the Court will only briefly discuss the background legal and factual issues herein.

respond to Itemized Assessment Protocol ("IAP") 5 (Doc. No. 416).

The Court granted Defendants' request for oral argument on plaintiffs' motion for an evidentiary hearing, and thereafter set aside the evidentiary hearing date of August 9, 2004, finding that the hearing requested was properly categorized as a contempt hearing. In an Order dated June 18, 2004, this Court ordered that discovery commence in order to allow Plaintiffs the opportunity to develop a record that would enable them to file a more detailed show cause motion, if warranted. The discovery currently underway will also aid the Court in determining what, if any, further steps are necessary to monitor and evaluate Defendants' compliance with the consent decree. While no contempt hearing has been set at this time, the Court will rule on Plaintiffs' motion for Rule 706 designation of the Court's experts, so as to provide clarity to both the parties and the experts, themselves.

II. DISCUSSION

The Court appointed Dr. Richard A. Carter, M.D., M.P.H., as Special Master (Doc. No. 264) pursuant to its December 20, 2002 Order (Doc. No. 227) and in its April 3, 2002 Order, prescribed certain procedures to be followed by the Special Master in the fulfillment of the tasks referred to the Special Master under those Orders (Doc. No. 270). The Court later amended the April 3, 2002 Order to, among other things, authorize the Special Master to "[r]etain the services of such independent experts and/or monitors as are reasonably necessary for the Special Master to fairly, effectively and timely evaluate, on an ongoing basis the implementation of the terms of the

Consent Decree and EPSDT law.... the Special Master shall have the ultimate responsibility for the selection of such experts and/or monitors, and such individuals shall report to the Special Master" (Doc. No. 291). Plaintiffs now request that the Court authorize these independent experts, retained by the Special Master, to serve as the Court's own expert witnesses in the potentially forthcoming contempt hearing.

In support of their motion to designate the Court's experts as witnesses, Plaintiffs rely on Rule 706 of the Federal Rules of Evidence, which authorizes a court to appoint its own expert witnesses to testify as to matters before it. Rule 706(a) instructs that an expert appointed by the Court "shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate." The Plaintiffs further argue that the Special Master's experts, nationally respected experts in their respective areas, "each has a solid base knowledge of TennCare and of the State's plaintiffs for the program as it pertains to EPSDT. There literally is no one more qualified anywhere to provide testimony as expert witnesses at the upcoming hearing" (Doc. No. 392). The Court acknowledges the authority vested in the Court by Rule 706, but concludes that appointing the Special Master's experts as the Court's own expert witnesses for the purpose of a potentially forthcoming contempt hearing is neither a proper nor prudent course of action.

Defendants, in their memorandum in opposition to Plaintiffs' motion for Rule 706 designation of the Court's experts, argue that the Court's April 3, 2002 Order expressly mandates that "[s]tatements made by any party, their agents, their counsel, or the special master during

these proceedings will be deemed confidential, are inadmissible as evidence to the same extent as discussions of compromise and settlement are inadmissible under Federal Rule of Evidence 408, and will not be construed for any purpose as an admission against interest." The Court's April 3, 2002 Order applied to the "course of the Court-Ordered mediation process," which ended with the Court's August 14, 2002 Order in which the Court found that "the Special Master's mediation efforts have not produced a consensus among the parties regarding a revised or enhanced plan for achieving EPSDT compliance" (Doc. No. 291). Nonetheless, the Court did not recast the lines of communication between the Special Master and the parties, their agents, and their counsel in the August 14, 2002 Order, or at any time thereafter, and for good reason. In an effort to facilitate compliance with the Consent Decree and with EPSDT law, the Court entrusted to the Special Master the ability to meet with the parties, counsel of record or third parties, either individually or collectively without the presence or participation of some or all of the parties or their counsel" (Doc. No. 270). As agents of the Special Master, the experts have been treated, thus far, as extensions of the Special Master, subject to the same open exchange of communication that the Court mandated for the Special Master himself. To recast these experts now as witnesses capable of rendering testimony as to the state's efforts towards compliance with the Consent Decree would conflict with the framework established by the Court in these proceedings. It would be, as Defendants argue, "sorely at odds with both the letter and spirit of the existing orders governing the compliance evaluation process" (Doc. No. 416).

More important still, to recast the Special Master's experts as witnesses available to testify in a future contempt hearing would effectively destroy the free flow of information that has allowed the experts to become intimately involved with the compliance process thus far. Without unfettered access to the details of the state's efforts to come into compliance with the Consent Decree, the experts will be unable to carry out their primary task of aiding the Special Master in "fairly, effectively, and timely evaluating on an ongoing basis the implementation of the terms of the Consent Decree and EPSDT law" (Doc. No. 291). The Court is primarily concerned with ensuring Defendants long-term compliance with the Consent Decree and EPSDT law. To this end, the Court finds it necessary to preserve the current role of the Court's experts as aids to the Special Master.

III. CONCLUSION

For the reasons stated herein, the Court DENIES Plaintiffs' Motion for Rule 706 Certification of the Court's Experts. The role of the experts shall remain as agents of the Special Master, subject to the Court's mandates regarding the duties and authoritative constraints of the Special Master. The ex parte communications between the Special Master and the parties, their agents, and their counsel, authorized by this Court in previous Orders, shall continue and shall apply to communications involving the experts, as well. The Court will hold in abeyance Plaintiffs' Motion to Compel Defendants to Comply with Reporting Requirements.

It is SO ORDERED.

Entered this the 13th day of July, 2004.

/s/ John T. Nixon
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

JOHN B., CARRIE G., JOSHUA M., MEAGAN A. and ERICA A., by their next friend, L.A.; DUSTIN P. by his next friend, Linda C.; BAYLI S. by her next friend, C.W.; JAMES D. by his next friend, Susan H.; ELSIE H. by her next friend, Stacy Miller; JULIAN C. by his next friend, Shawn C.; TROY D. by his next friend T.W.; RAY M. by his next friend P.D.; ROSCOE W. by his next friend, K.B.; JACOB R. by his next friend, Kim R.; JUSTIN S. by his next friend, Diane P.; ESTEL W. by his next friend, E.D.; individually and on behalf of all other similarly situated,	No. 3-98-0168 Judge Nixon
Plaintiffs,	
v.	
NANCY MENKE, Commissioner, Tennessee Department of Health; THERESA CLARKE, Assistant Commissioner, Bureau of TennCare; and GEORGE HATTAWAY, Commissioner Tennessee Department of Children's Services	
Defendants.	

ORDER

(Entered April 3, 2002)

The Court has previously directed the parties to meet with the special master to discuss the procedures to be

followed in his fulfillment of the tasks referred to him pursuant to the previous findings and order of this court. The Court is informed that the parties and the special master have conferred and that they do not object to the entry of this order.

It is, accordingly, ORDERED without objection that the special master shall exercise the following powers and adhere to the following procedures in his discharge of the responsibilities previously entrusted to him as outlined in the Findings of Fact and Conclusions of Law of December 20, 2001:

(1) The special master may meet or communicate with the parties, counsel of record or third persons, either individually or collectively, without the presence or participation of some or all of the parties or their counsel. Before conferring with a state employee the special master shall inform her of her right to have defense counsel present during the meeting or communication. Upon request of the source, the confidentiality of the source of such communications shall be maintained by the special master. The substance of communication is governed by paragraph 2.

(2) Upon request, the special master shall be afforded access to such records or persons as necessary to fulfill the responsibilities contemplated by the Findings of Fact and Conclusions of Law of December 20, 2001, as qualified by paragraph one above. Upon request, each party shall have access to any electronic or written materials which are relevant and material and upon which the special masters relies in fulfilling his responsibilities, including the formulation of

any finding or recommendation. Upon request, the special master shall disclose to the parties the general substance of any oral communications with third parties, state officials, or plaintiffs, which are relevant and material and upon which the special master relies in fulfilling his responsibilities including the formulation of any finding or recommendation.

(3) During the course of the Court-ordered mediation process, the special master and the parties, their representatives and their counsel will not discuss any matter relating to the mediation, including proposals and positions of the parties, with the media (print, radio, television or other) except by express written permission of all parties and the special matter.

(4) Statements made by any party, their agents, their counsel, or the special master during these proceedings will be deemed confidential, are inadmissible as evidence to the same extent as discussions of compromise and settlement are inadmissible under Federal Rule of Evidence 408, and will not be construed for any purpose as an admission against interest.

(5) The proposals and positions of any party, their agent or counsel, or the special master during the mediation will only be shared with non-parties to the extent necessary to

elicit information or feedback about perceived problem and/or potential solutions.

(6) All other matters are reserved.

/s/ John T. Nixon
Senior United States District Judge

No. 06-5566

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: M. D. GOETZ, COMMISSIONER, TENNESSEE DEPARTMENT OF FINANCE AND ADMINISTRATION, ET AL., Petitioners.	)))))	ORDER (Filed Sep. 29, 2006)

BEFORE: SILER, DAUGHTREY, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate [magistrate judge]

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate [magistrate judge] shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate [magistrate judge], or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate [magistrate judge], bankruptcy judge,

spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Fed. R. Civ. P. 53. Masters

(a) Appointment.

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(3) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) Order Appointing Master.

(1) *Notice.* The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(2) *Contents.* The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances – if any – in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(3) *Entry of Order.* The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(4) *Amendment.* The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.

(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The

master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

(e) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) Master's Reports. A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

(g) Action on Master's Order, Report, or Recommendations.

(1) *Action.* In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(2) *Time To Object or Move.* A party may file objections to – or a motion to adopt or modify – the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(3) *Fact Findings.* The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) *Legal Conclusions.* The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) *Procedural Matters.* Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

(h) Compensation.

(1) *Fixing Compensation.* The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.

(2) *Payment.* The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) *Allocation.* The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(i) Appointment of Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

Notes of Advisory Committee on 2003 amendments.

* * *

Subdivision (a)(2), and (3). Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(3) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances – and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety – consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. It may happen that a master who is an attorney represents a client whose litigation is assigned to the judge who appointed the attorney as master. Other parties to the litigation may fear that the attorney-master will gain special respect from the judge. A flat prohibition

on appearance before the appointing judge during the time of service as master, however, might in some circumstances unduly limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer master, and perhaps on the master's firm as well.

Subdivision (b) . . .

Ex parte communications between a master and the court present troubling questions. Ordinarily the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications with the court. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court exercise its discretion and address the topic in the order of appointment.

* * *

IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

JOHN B., et al,	)	
Plaintiff,	)	
v.	)	CASE NO. 3:98-0168
MENKE, et al,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

DATE: April 17, 2006

TIME: 2:30 P.M.

BEFORE: WILLIAM J. HAYNES, JR.

- -

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[2] APPEARANCES:

For the Plaintiff: Gordon Bonnyman
Michele Johnson

For the Defendant: Charles Cooper
Michael Kirk
Nicole Moss
Ron Harris
Robert Cooper

[3] PROCEEDINGS:

THE COURT: We're here in the case of John B., et al v. Menke, 3:06-0168. Would the parties state who is here and on whose behalf. On behalf of the plaintiffs.

MR. BONNYMAN: May it please the Court, I'm Gordon Bonnyman of the Nashville Bar, here with my colleague Michele Johnson. And we're representing the plaintiffs.

THE COURT: For the defendants.

MR. COOPER: Thank you, Your Honor. My name is Chuck Cooper, here representing the defendants. With me is Michael Kirk, Nicole Moss, my colleague Ron Harris, and the government's counsel Bob Cooper.

THE COURT: Are the monitors present? I know there was a conflict. We tried to accomodate everybody.

MS. KAY: Yes, Your Honor. All five of us are here.

THE COURT: Are there any preliminary matters before we get started? If not, the Court's preference was to go through the pending motions, including those that were filed recently, unless the parties feel that there is some need for additional time.

Specifically, I'm referring to the plaintiff's motion concerning the discovery of the former special master and his experts. Under the local rules, you get your full ten days, but it seems to me that part of the discussion of these other matters is probably going to embrace that anyway, and it might [4] be moot by the time you get to it.

MR. COOPER: It may well be, Your Honor. And for that reason I think I would prefer to withhold judgment on whether we would ask for an opportunity to put a paper before the Court until we see how things are unfolded.

THE COURT: The first one is the defendant's motion to reconsider, which is docket entry 609. Does the defendant want to be heard any further on that?

MR. COOPER: No, Your Honor. We're content to rely on the paper that we filed with the Court. I don't have anything to add, unless the Court has questions, of course.

THE COURT: Well, what I needed was any additional to make sure I had a thorough discussion of the issues before I decide it. For that reason, I entered the order for any supplementation of authorities. And having received none, I don't have any further questions.

Does the plaintiff desire to be heard any further on those matters?

MR. BONNYMAN: No, thank you, Your Honor.

THE COURT: Well, from the Court's review of this, the first major contention in the defendant's motion to reconsider concerns the request for the disqualification of the former special master and his assistants. The Court sees no reason to deviate from its prior statement of reasons in its earlier order, docket entry number 601 at pages two and three.

[5] As to the contention that technical assistants or advisors can't testify, and must comply with Rule 706, from the Court's review in Riley v. United States, 63 F2d,

139, 156, (3rd Circuit 1998), the First Circuit concluding, citing two of its prior precedents, that:

We conclude that Rule 706, while intended to circumscribe a right to designate expert witnesses, it was not intended to subsume a fidiciary's inherent power to appoint technical advisors. The civil rules, after all, were never meant to be the sole repository of all the federal Court's authority.

The Court notes that the Supreme Court decision, In Re Peterson 253, United States, 300 at 312 (1920), which involved the Court's inherent authority to appoint a technical advisor, in that particular case the technical advisor also filed a report that was received in evidence. That is discussed particularly at pages 311 and 312. At 311, the Supreme Court noted that:

The report will, unless rejected by the Court, be admitted at the jury trial as evidence of facts, findings, embraced therein, but it will be treated as prima facie evidence. The parties remain free to call, examine and cross examine witnesses as if the report had not been made.

In this case, the former special master and assistants were deemed technical advisors because the Court did not want to [6] lose the benefit of their extensive study and review of the matters pursuant to an earlier order of the Court. While Rule 706 is an independent source of authority for the Court, the Court has, in the exercise of its inherent authority, adopted in its order many of the provisions in Rule 706 as well as Rule 26(a)(2) by requiring that they disclose the basis for those opinions, and that they testify as to the areas in which they work and in which they have provided assistance to the Court.

The only matter that was excluded was communications between the special master and Judge Nixon. And under the Gary W Fifth Circuit decision that the Court cited in docket entry number 601 at page two, that information, in the Court's view, is not appropriate for discovery.

In this case, the technical advisors again are being appointed pursuant to the Court's inherent authority. To the extent that anything has been presented, there will be discovery, there will be the opportunity to examine them in discovery and at trial.

So the Court does not discern any prejudice to the defendants in this matter from the appointment of the former special master and his assistants as technical advisors in this Court.

The next major contention appears to be that the Court adopted Judge Nixon's earlier order of October 2, 2004. The law of the case doctrine, Arizona v. California, page 6 at U.S. 605 [7] (1983) allows the Court to revisit any prior order of the Court and allows the Court to review them for manifest injustice.

In light of the extensive commitment of the financial resources in this case by the State, the plaintiffs, and the special masters and its experts, the Court felt that it would be a manifest injustice to ignore the prior factual findings that were made by Judge Nixon in connection with what he had heard at the hearing at which he made factual findings.

So to the extent that the Court adopted factual findings set forth in its October 22, 2004 order, the Court considers that to be an appropriate exercise of this Court's

discretion as the newly assigned judge to this case, and I don't believe that contention has merit.

The next major contention appears to concern the burden of proof that the Court's order sets upon the defendants. The cases cited at docket entry 601 at page three – those cases are cited for the proposition that once a prima facie showing of contempt has been made, the burden of proof shifts to the party who is charged, who is found to have – or who has been shown to have been subject to contempt, that the burden shifts to the party against whom the proof has been made to carry the burden of proof.

In this case, I said – and when I extensively reviewed the prior record in this case of Judge Nixon's prior orders in this case, the Court felt that there had been sufficient and [8] numerous prior findings of noncompliance with the consent decree and the orders of the Court, and that, in every instance Judge Nixon reserved the issue of contempt to put ahead the issue of the children.

So, based upon those prior findings by Judge Nixon, the Court believes that the cases cited stand for the proposition that there has been a sufficient showing on the issue of contempt that the burden should shift to the defendants.

From the Court's view, the defendants do not give adequate consideration of what the historical record is in this case, and leaves the Court with the impression that they seek to start anew. And this Court, in its decision on this particular issue, as I stated when I reviewed the record, relied on the history of the litigation.

The next issue that they raised in their motion is the appointment of the monitors as being not justified. Based upon the earlier ruling of the Court, the Court feels that monitors are necessary for the Court to decide the issues in this case. That is reflected first in Judge Nixon's order.

Now, the defendants have raised this issue of disqualification. And to avoid or to minimize the risk of doing this all over again, the Court felt that the appointment of independent monitors to serve a different function for the Court would be appropriate. And the appointment of those monitors is different in that these monitors will be helping and assisting [9] the Court and the parties in identifying issues to be pursued further. There has been some passage of time, and there are references that things have changed, but the Court feels the need of monitors, given this complex and extended litigation, to assist the Court and the parties in identifying what remains to be decided in this – what remains to be heard and presented at an evidentiary hearing in this case.

It was the defendant's pursuit of the disqualification of the special master and the former assistants that resulted in the appointment of the monitors.

As to compensation of the monitors, given the factual predicate that there is a need for the monitors, the defendant's noncompliance on a repeated basis with the orders of the Court, the Court believes that Sixth Circuit decision in Reed justifies the order that these monitors be compensated.

* * *

The next significant issue again goes to what the Court views as a disqualification of the special master and his former assistants. As Judge Nixon ruled in his order on his recusal, any bias issue would be moot. This Court has adopted Nixon's order in that regard.

As noted in earlier aspects of this litigation, the fact that the special master was contacting Judge Nixon was a matter of public record, disclosed to the parties, occurred over a period of time before the issue was raised. And therefore, as I believe the Court stated earlier, any objection on this issue was waived. The defendant cannot sit on its rights, when it was aware of these facts, and wait a significant period of time in which to raise them.

As I said earlier, the Court declines to lose the accumulated knowledge of the former special master and his experts. Whatever is the basis for the positions that they hold, those are and will be subject to examination. So I believe that there is no prejudice to the defendant in any of the rulings.

And as I said earlier, to the extent that the monitors are raised, the monitors are providing a slightly different function than the special master and his former assistants. And they are more in the line of identifying what issues are to be [12] pursued by the parties and the Court.

* * *

[17] MR. HURDER: Good morning, Your Honor. I'm Alex Hurder. On the question of availability, I am available and willing. I do have a full-time job teaching at Vanderbilt in the legal clinic and was not anticipating this, so time is fairly tight, although I would be free to devote

some time to it. I'm trying to gauge how much that might require.

THE COURT: Well, I would hope that – I have retained the former special master and his assistants as technical advisors because I did not want to lose the resources that have been expended or the acquired knowledge that they have accumulated in their work. I think that that remains of benefit to the parties and to the Court and to the monitors.

So I would hope that their expertise would ease the burden on the monitors. But that remains to be seen, of course.

* * *

[37] REPORTER'S CERTIFICATE

I, Peggy G. Turner, Official Court Reporter for the United States District Court for the Middle District of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on April 17, 2006, in the matter of John B. V. Menke, case No. 3:98-0068; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript, pages 1 through 36, is a true and accurate record of said proceedings.

This the 18th day of April, 2006.

S/Peggy G. Turner, RPR
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

JOHN B., et al,	)	
Plaintiff,	)	
v.	)	CASE NO. 3:98-0168
MENKE, et al,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

DATE:	February ~~10~~ 28, 2006
TIME:	2:00 P.M.
BEFORE:	WILLIAM J. HAYNES, JR.

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[2] APPEARANCES:

For the Plaintiff: Michele Johnson
Gordon Bonnyman

For the Defendant: Charles Cooper
Michael Kirk
Linda Ross
Ron Harris
Nicole Moss

* * *

THE COURT: Do you want to respond to Ms. Ross's letter that was attached to their opposition?

MR. COOPER: Your Honor, Ms. Ross filed that letter at the insistence of the special master at the time, who had reacted very negatively to the formulation –

THE COURT: It wasn't directed to the special master.

MR. COOPER: No, it wasn't directed to the special master. It was directed to the employee of the state who had used the formulation alleged violations of EPSDT law, an unfortunate formulation in the context of that letter. The special master insisted that a letter correcting the employee be written, and Ms. Ross complied with that request. We have never, and do not now, and in none of our papers have we denied the existence of the 2001 findings of fact, nor have we made any – nor has the state at any point, then or since, acquiesced or [5] accepted those findings as being free from objection by the state.

THE COURT: But did you withdraw your appeal? Did the state withdraw its appeal?

MR. COOPER: It did withdraw its appeal, and an appeal as I understand those proceedings, and I can't represent to the court that I'm intimately familiar with every procedural event that took place, but an appeal was also dismissed as premature. The court will recall, I'm sure, that the State and the hearing that took place and the findings of fact that eventuated from that hearing in 2001 was on a motion to hold the state in contempt of the consent decree obligations that the State had agreed to.

Never was there an occasion for the state to understand that liability under EPSDT law was being contested

or that its conduct was being tested, apart from the consent decree, against the requirements of EPSDT law in general. And not until the findings emerged did it grasp that it was at risk or vulnerable to a finding of violation of EPSDT federal law as opposed to its undertakings in the consent decree which, of course, were designed to avoid and to obviate the necessity of such litigation or such findings.

Apart from those considerations, though, Your Honor, the question, as we see it – and let me just return to that to just complete that line of thought. The order that was entered [6] at that time was one for the parties to mediate through the offices of then a mediator, Dr. Carter, mediate some plan or some process for bringing the State into compliance with the violations that the court had then found.

Those mediations did not produce any type of agreed solutions, and the mediators' responsibilities then more or less evolved more into those of a special master, a monitor, if you will, as the Court has denominated, a quasi-judicial officer designed to then monitor compliance with the existing consent decree. Not any additional or new requirements.

THE COURT: I think that's how the case law characterizes the position.

MR. COOPER: I beg your pardon?

THE COURT: I believe that's how the case law characterizes the position.

MR. COOPER: Yes, sir. As a monitor. And so several years now have gone by. The state has, despite – in

our view, despite the plaintiff's assessment and its representation to the court, the state has, over the past six years since that time, endeavored in good faith and at very considerable expense, to rectify any concerns that there may be with the State's compliance, and does believe that it is in compliance with its obligations under the consent decree and federal EPSDT law as we stand today.

That is our position, Your Honor. And in our view of [7] the posture of the case, the course of proceedings that the parties are now on that the court has outlined will test that conclusion. And we're perfectly happy to be put to that test. Thank you.

* * *

MS. JOHNSON: Your Honor, the State has objected previously to the IPB use because it was provided to the special master in confidence. That's why we asked the question. If the monitors can rely on that, even though it's not talking about the monitors going forward, but information they provided to the special master, that's the reason for clarifying that.

THE COURT: Well, do you still maintain your objection with respect to this IPW?

MS. JOHNSON: IWP and IAP.

MR. COOPER: Your Honor, again, the State does not recognize the objection that counsel is attributing to it.

THE COURT: So the issue is moot. There is no objection.

MR. COOPER: Well, to the extent there is information in the IAP that the State has provided to the

special master and [34] to the plaintiffs, there is nothing in the IAP that hasn't been provided to the plaintiffs. We don't understand where the confidentiality issue arises. There may be information in that that we would have an admissibility objection to. But as the Court said, that would remain to be seen. We don't believe that information to be confidential.

THE COURT: It seems to me that if we are going to set the special master up with these monitors and ask them to do things on an expedited basis, they need to maximize access to whatever relevant information would be of benefit to them. That includes, to me, whatever the special master had previously presented to the Court.

So I take it the issue is moot. Do you accept that, Ms. Johnson?

MS. JOHNSON: That would be wonderful, Your Honor. The Court hasn't actually seen the IAP and IWP because of these objections. So that the special master received the planning documents. They received those documents, and the State said they didn't want the Court to see them. I'm saying that for a matter of clarification.

* * *

THE COURT: Let me be clear. There is no objection to communications between the monitors and the special – former special master and his assistants?

MR. COOPER: No, Your Honor: We do object to that. We've made that clear in our motions to reconsider. And we continue to believe that the special master and his experts are vulnerable to the concerns that we have outlined previously. So [36] therefore, Your Honor, we do maintain that objection.

THE COURT: Well, you weren't here last time. I will give you an opportunity to respond to this. If the issue is whether the license proposed by the experts will ensure compliance with the consent decree, why isn't that the controlling issue? As opposed to who they talked to? Isn't that the real issue, is whether the plan is effective? If the issue is whether the plan is effective and they have laid out their plans and recommendations, it's the merits of those recommendations that are of issue before the Court.

MR. COOPER: And Your Honor, I guess we believe that we ought to be entitled to take discovery into the basis –

THE COURT: Well, there is nothing that – I'm sorry, I interrupted you. Go ahead.

MR. COOPER: The Court has allowed parties to take discovery of the technical advisors to the Court.

THE COURT: Well, they are really a hybrid. They are the technical advisors, but the Court also contemplates that they will be witnesses because of their accumulated knowledge in their proposals. And you are going to get all of the listing of documents for their recommendation. And you will have an opportunity to depose them and conduct discovery.

The only issue that the Court has limited you is concerning any discussions between the special master and his assistants and Judge Nixon. Other than that, you get to ask [37] anything you want.

MR. COOPER: Is the Court including discussions between the special master and his assistants and counsel for the parties? Is that available on –

THE COURT: Well, I think Judge Nixon's order previously covered that in terms of confidentiality, didn't he? Because the special masters were serving a hybrid purpose. It's the same confidentiality that the Court is extending to the monitors in their discussions.

MR. COOPER: Your Honor, we believe and continue to maintain that the concerns that the State has voiced to the ex parte communications between the special master and Judge Nixon require inquiry so long as either Judge Nixon or the special master and his experts remain involved in the case.

THE COURT: Well, Judge Nixon is out.

MR. COOPER: Yes, Your Honor.

THE COURT: There is not going to be any ex parte communications with me. Everything with me is going to be on the record.

MR. COOPER: Yes, Your Honor. We've made clear that we acknowledge and embrace the Court's limitation to that. But –

THE COURT: And if the issue is, – the real issue before the Court is whether what they have proposed is effective and will ensure compliance. That's really the issue.

MR. COOPER: Your Honor, I hear the Court, I understand [38] the Court's point, but we are just going to have to disagree, with respect.

THE COURT: Well, I'm trying to figure out, on the issue before the Court, what that would elicit.

MR. COOPER: Your Honor, we believe that we are entitled to inquire to any and all bases for the experts and the special master's plan of remediation. And that includes any contacts and any information on which they base their decisions, whether those contacts and information relate to now involvement with the plaintiffs from plaintiff's counsel, notwithstanding the confidentiality order, because that confidentiality order, Your Honor, was, we are concerned, not ultimately enforced insofar as ultimate discussions with the judge, we're concerned.

THE COURT: The order in the history of this litigation is clearly reflective that the special master was going to be contacting the Court.

MR. COOPER: No, Your Honor. No.

THE COURT: Okay.

MR. COOPER: I don't even think it contemplated contact with the Court on procedural and administrative issues ex parte, but we have acknowledged that that would not raise the concerns and the considerations that we have voiced. And to whatever extent confidential communications formed the basis of the plan of remediation and then were discussed with the Court, the confidentiality of those communications was obviously [39] compromised, should not now be, we believe, protected from disclosure to the parties interested in discovering into the bases of the expert's plans and the special master's plans.

THE COURT: Let me ask you this. When you retain an expert in litigation, are the discussions between you and your experts discoverable?

MR. COOPER: As a rule, no.

THE COURT: But otherwise, they are entitled to all bases on which the expert rests their opinion, aren't they, under Rule 26(a)(2)?

MR. COOPER: Yes.

THE COURT: So you are able to ascertain all of the bases for the expert's opinion without at least some of the information, aren't you?

MR. COOPER: Yes, sir. Yes. But if her expert had talked to my employees, in discussions of which I have no knowledge, and her expert based her testimony and her findings or the expert's testimony, findings and recommendations to the Court on any such conversation, I would definitely want to know what that was. And particularly I would want to know what that was if her expert then had ex parte conversations with the Court that I was not privy to. I would want to know what those conversations were too. And I would want to know then if the Court was no longer involved.

Because it's hard for us to grasp – and obviously if [40] there is no merit, and discovery disclosed that there was no merit to any substantive conversations that took place, then we would stand down on this concern. But if, on the other hand, the contrary was true, and a disqualification motion would be well taken, it's our position, Your Honor, it would have to be well taken for the judicial officer and the quasi-judicial officer involved.

THE COURT: Thank you.

MR. COOPER: Yes, sir.

MS. JOHNSON: Can I just respond to a couple of things, Your Honor?

THE COURT: Yes.

MS. JOHNSON: And think we filed pleadings to this effect.

THE COURT: I think I know what you are going to say, but go ahead.

MS. JOHNSON: The special master made it clear to all of the parties from beginning of litigation that he was meeting with the court board, as he called them, every month. And so he has filed parking tickets. They have known from the get-go that he met with the Court. I don't understand Mr. Cooper's statement about what taint remains, in light of the fact that the Court has gone, the argument he is going on about is gone. It's hard to defend against argument that somehow the special master is tainted with knowledge of noncompliance, because that [41] is the substance of – the only communication with the special master was about noncompliance.

I guess the other concern, Your Honor, is that, as you say the, issue was the plan and the information the plan is based upon. My concern is the State has made the issue compliance. So I'm concerned about how we get to a hearing about a plan when the State's position is that they are in compliance.

THE COURT: That's one of the issues to be decided.

MS. JOHNSON: If there is some way to bifurcate those two issues so that we can focus on compliance before we get to the plan, it might ease the complexity of the issues.

THE COURT: I don't understand the last statement.

MS. JOHNSON: Well, if the hearing and the monitor's charge is about compliance, then it seems like once there is a finding about compliance, current compliance, then it's a clear issue to get to the plan and the merits of the plan.

THE COURT: Well, in the last conference, the Court reviewed with parties my review of the record. And included in that review were references in orders in the consent decree to filing the plans.

Now, I understand there are differences of views about plans, but that, too, as the Court views it, will be an issue to be decided. Because all outstanding issues are going to be decided in June, including that one.

[42] MS. JOHNSON: And by plan, I wasn't talking about the State's plan but the special master's plan.

THE COURT: I understand.

MS. JOHNSON: Okay.

THE COURT: All right. Are there any other matters anybody wants to raise? We'll be in recess for a few minutes.

(Recess.)

THE COURT: Before we take up the motion for a protective order, the Court is going to enter an order appointing these monitors and request that the monitors meet with – first meet amongst themselves and to select a

lead monitor for the purpose of being able to receive communications from counsel. And I will ask counsel to designate among themselves who they want to be the contact for the mediator. So the lead mediator can either make arrangements or one of the other monitors can contact one person to make the arrangements to get whatever information is needed.

I will also recommend that the monitors allocate amongst themselves which area of responsibility they want to assume – they want to take as their designated area.

I would also recommend that the monitors meet as soon as practicable with the former special master and his assistant for the purpose of trying to match up, if you will, with the expert in the designated area. I have retained the special master and his former assistants because I did not want to lose [43] the accumulated knowledge that they have acquired about what the State is doing and the State system.

* * *

[103] CERTIFICATE

I, Peggy G. Turner, Official Court Reporter for the United States District Court for the Middle District of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on February 28, 2006, in the matter of B., et al v. Menke, case no. 3:98-0168; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript, pages 1 through 103, is a true and accurate record of said proceedings.

This the 1st day of March, 2006.

S/ Peggy G. Turner, RPR
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

B., et al,	)	
Plaintiff,	)	
v.	)	CASE NO. 3:98-0168
MENKE, et al	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

DATE: February 10, ~~2005~~ [2006]

TIME: 2:00 P.M.

BEFORE: WILLIAM J. HAYNES, JR.

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[2] APPEARANCES:

For the Plaintiff: Michele Johnson
Marjorie Bristol

For the Defendant: Michael Kirk
Linda Ross
Ron Harris

For Intervenors: George Barrett

* * *

THE COURT: All right. I just received today the plaintiff's memorandum basically outlining their views on the current state of affairs. Did the defense counsel get that and have an opportunity to review it?

[5] MR. KIRK: Your Honor, we received it this morning and have paged through it, but it's fairly lengthy. I can't say that we have study it closely.

THE COURT: Well, the Court would join in your observation, and neither did I. But I did read the principal memorandum. I set this case for conference after viewing Judge Nixon's last order. The Court has reviewed the file.

Now, as to the pending motion, I think in actuality Judge Nixon's order refers to that, but in actuality, since I have entered the case, I have ruled on a couple of motions. And the only ones that are technically pending are two motions to file sealed documents filed by the plaintiff, and I don't see any reason why those should not be granted, and the court is inclined to grant them. Any objections?

* * *

THE COURT: Is the special master present? I do not know him by presence.

SPECIAL MASTER: Yes, Your Honor.

THE COURT: All right. So the Court wanted to just make sure whether you were here or not. Now, as to the scope of the – having the motions decided, the next issue that the Court wanted to discuss, and is set forth in Judge Nixon's order, concerns the continuing role and authority of the special master in this case. And I will give each side an opportunity to be heard on that.

MS. JOHNSON: May it please the Court, I'm Michele Johnson of the Nashville Bar. Your Honor, from the plaintiff's perspective, it is vitally important that strict judicial [7] oversight continue to occur. We ask the Court to stay the course.

There is a sprawling record in this case dating back to 1998. And Judge Nixon's recent order encapsulates where we are. There have been repeated findings of noncompliance, broken promises to the children who rely on TennCare. The state's own documents concede that they are not honoring those promises.

The Court appointed a special master to efficiently deal with the health needs of –

THE COURT: I'm familiar with – I've done my best to familiarize myself with the file.

MS. JOHNSON: I guess from our perspective, without the special master being involved, and his experts, evaluating the state's plans for compliance and their progress or regression around compliance with the consent decree, there is little hope that children will get the medical care that they need. And we do think it's vitally important that a new order of reference be entered to basically clear up any ambiguities that the State may raise. There has been a change in the law since the special master was appointed. And we propose that each party provide draft orders to the Court, or respond to the court's order of reference, so that it's clear that the special master's role is one that everyone is familiar with and there are clear boundaries about what he can or can't do.

We have in our memo outlined the plaintiff's [8] perspective what his roles will be. And from our perspective, it's

vitally important that he stay involved and his experts continue to provide evaluation and insight to the Court about how the state is doing in developing a system for children.

THE COURT: For the defendant?

MR. KIRK: Thank you, Your Honor. Michael Kirk on behalf of the state. First and foremost, Your Honor, we would request the opportunity to respond in writing to the pleading that was filed this morning, which does, I believe from the plaintiff's perspective, address the question posed first by Judge Nixon at the end of his recusal order, then by this Court in the order setting the hearing; that is, the question of whether it is – the continued necessity of the office of the special master. We would like to respond in detail to these papers. It would be our view that the office is no longer necessary, and we would expect to set forth in detail the reasons for that view.

Wholly apart from that, though, there is a second issue, Your Honor. And that is, if it is decided by the Court that the office – there is a continued necessity for a special master, we think the Court would have to take up the question of whether it's appropriate for Dr. Carter to continue to occupy that position.

As I think the court is aware from reviewing the file, there was pending before Judge Nixon a motion seeking discovery [9] into certain ex parte contacts the special master and experts had had with the Court concerning the merits of the case. If it is contemplated that Dr. Carter will continue in the case, it's the State's view that that will have to be taken up first, because as the State has indicated in its papers over the last year on that issue, it would be the State's view that it's entirely possible, based

on what we know now, that Dr. Carter could not continue in the role of the special master, and at the very least, it's our view that what is known is far beyond sufficient to justify any discovery.

Now, the Court will note that the Judge Nixon's recusal order I think sought to avoid the distraction of litigation along those lines. And unfortunately, it would be our view that the only way to do that would be to either agree with our position that the office is not necessary or if the Court decides otherwise, to appoint a new special master.

If Dr. Carter is to remain, it would be our view that the appropriate course would be to allow the discovery first before he undertakes any additional activities.

And with that, Your Honor, we would just request the opportunity, within the time alloted by the rules, to respond on those points to the paper that the plaintiffs have submitted.

Thank you, Your Honor.

THE COURT: Well, the Court, as I mentioned to you, has tried to come to an understanding of the file. And my remarks, [10] I think, reflect my views, not only on the role of the special master, because when you consider what should be the role of the special master, it seems to the Court you have to get some sense of where the litigation is and where the litigation ought to go. And to do that, to me, required a review of the file, particularly the orders of the Court, and the critical documents in the case that were filed in the case to get an assessment in this matter.

* * *

[20] In docket entry number 465, a memorandum of the court on October 22, 2004, the Court stated, quote:

The consent decree approved by the court granted declaratory and conjunctive relief on the plaintiff's EPSDT claims and enjoined the defendant state officials from depriving plaintiffs of EPSDT services and proscribed a detailed, multi-year remedial plan for ensuring compliance with the plan's EPSDT mandate.

It also states in relevant part:

The Court appointed a special master to supervise the implementation of an EPSDT compliant plan.

On page three:

Should the court approve a remedial plan after reviewing comment by defendants and plaintiffs, defendant shall be obligated to follow its terms in an effort to finally achieve compliance with the consent decree in place.

* * *

In docket entry 465, a memorandum on page four.

On June 23, 2004, the plaintiffs deposed Dave Goetz, Tennessee Commissioner of Finance and Administration, and on June 24, 2004 plaintiffs took the deposition of Manny Martins, Deputy Commissioner of Finance and Administration for TennCare. Both deponents attested to sincerity, good intentions, and hard work of those state employees who have labored since 2001 to comply with EPSDT. Mr. Martins testified that the state is making inroads in the area of outreach. Quote:

From 1999 to 2003 we had a 175 percent increase, I [25] believe, and our screening rates fell from, as an example, 19.8 percent to 53 percent. We had a 60 percent increase in our dental screening rates, 55, 56 adjusted. The raw is 36 to 62 for 2002, raw 54, adjusted 41.9.

Quoting the Martins deposition at 57.

Mr. Martins also reported that TennCare has staffed 22 dental clinics and has contracted with the Department of Health for dental outreach, dental operatory, and mobile operatory. Mr. Martins has stated that, by the way of a new contract with the Department of Health for $7 million, effective July 1, 2004, every single TennCare enrollee would be contacted by their local health department with newly set-up call centers.

After describing Mr. Goetz's testimony, the Court found as follows:

The Court is not convinced that the defendants, acting on their own, will reach full compliance with terms of the consent decree within a reasonable period of time. As the health of 550,000 children is at stake, something more must be done to ensure the State's EPSDT requirements are met in accordance with the terms of the consent decree.

And it goes on. On page six:

The Court finds that the deposition testimony of Mr. Goetz and Mr. Martins conclusively supports this Court's conclusions that, to date, the State has not achieved compliance with the terms of the consent decree.

[26] At page six.

The Court also states at page six, going on to page seven:

Specifically, with respect to the screening requirements in the consent decree, Mr. Martins testified that the State is not meeting the 80 percent standard in the consent decree. Mr. Martins testified that, while he would like to review the numbers, the last figures he had seen indicated that the state is not meeting the 100 percent screening requirements under the consent decree for children who are in State custody. Further, Mr. Martins stated that, with respect to dental screening and dental services, the state is not in compliance with the consent decree. Other areas of particular concern testified to by Mr. Martins include the current inadequacy of Behavioral Health Network and the state's failure to meet the consent decree's required provision of EPSDT services to the children in DCS custody.

The Court goes on to say:

This is not a finding that the state has acted in bad faith or has intentionally failed to comply with the consent decree. To the contrary, the Court acknowledges, as set forth above, the state has made progress toward compliance in some areas. However, these efforts have not produced the results mandated by the consent decree six years ago.

In its final order, docket entry number 554 at page [27] three:

With the children's best interest in mind, the court instructed the special master to create a comprehensive plan to achieve compliance with consent decree and the EPSDT requirements. The Court provided a copy of the

special master's proposed plans, permitted them to review it, file objections, engage in discovery, to obtain additional facts about the proposed plan and submit comments and suggestions to the plan, and, after reviewing, and if necessary, incorporating the parties' comments, the court intended to implement the new plan.

At page four the court also stated:

Without taking into account the October 22, 2004 order, the history of this case reveals that this court has consistently found the State to be in violation of the consent decree and the EPSDT requirements. Indeed, the State's own documents show that they are not in compliance with the terms of the consent decree. See docket entry 546 at 1, showing that, even in 2004, the State is still below screening targets that should have been achieved in 2001. Notwithstanding this repeated finding, the court took the unusual path of not holding the State in contempt or imposing monetary sanctions. Indeed, the Court has attempted to steer this case away from the needless, acrimonious litigation and focused on fashioning a solution that will increase compliance with the consent decree and the federal EPSDT requirements. This constructive approach [28] has been fueled by one goal: To provide the underserved children of Tennessee the entire spectrum of medical benefits to which they are entitled under federal law.

Now, I have reviewed with you all these findings from the court's review of this record because, in my perspective, they give me guidance on where this case should go. And it seems to me that we should go in the following direction.

First, I'm going to give the state 30 days from today to file any documents with the court – I don't care what they call it – whatever it is that the defendants contend represent their plan or process or policy or rule or regulation or guidance, whatever it is, it is to be filed 30 days from today.

I want to know – there were two plans filed under there was one plan attached to Judge Nixon's order to which he referred in his last order. There is another plan attached that was filed under seal. And I need to know which plan, if either, the plaintiffs would adopt as a plan that they would agree with, or whether the plaintiffs want a period of time in which to develop their own plan, whichever the plaintiffs want to do.

MS. JOHNSON: Your Honor, the plaintiff's position is that the state is in the best position to develop a plan, if we can only motivate them to do so. And so, though we are happy to respond to the plan, we don't have the expertise. The special master –

THE COURT: No, I'm just giving you the opportunity. [29] As I read earlier, Judge Nixon recognized that the State was in the best position because they have the most resources and the most information to make the plan. But, given the history of this case and the necessity of the plan, if you wanted to do that, I was affording you the opportunity.

MS. JOHNSON: Thank you very much. We think the experts that have been gathered with the special master are the national experts in the areas of children's health, and it would be very important for them to be able to evaluate any plan that the state put forward. And that

is what we think would be a proper solution, given our lack of expertise.

THE COURT: Now, with respect to the special master and the experts employed, the State, once again, made reference to the need for discovery on the experts. In their motion papers, the defendants made a reference to their need to this discovery to evaluate whether the judge should recuse himself. And I agree with Judge Nixon that, as a result of his recusal, that any of those matters concerning discovery are moot.

With respect to the role of the special master, we are now eight years after entry of the consent decree. And the judge who had this case was finding on the day he recused himself that the defendants were in violation of the consent decree, and, from the court's perspective, did not have the information needed to evaluate even where the situation is as of now.

[30] There has been a substantial amount of resources expended on the current special master and the experts. The Court believes that the current role for them would to be as expert witnesses in this case. And therefore, I am going to give the parties 60 days from today to – 60 days from today to conduct any discovery on the current plans before the Court, and an additional 30 days after the State files whatever it is it is going to file, to conduct discovery of the experts on whether what they file is adequate or not.

I don't know what they are going to file. I don't know how voluminous it will be. For that reason, I can't evaluate how much time the experts need. But if there is anything apparent to me and my review of this case, is the need to get this case in a position where the Court can adjudicate

whether they are compliant or not and to enter appropriate relief.

The court shares the view of Judge Nixon that the real issue is to look to the future. And that's what I'm trying to do. If the defendants want any of – through their papers they keep making references to the fact that they have not been held in contempt, but if they want the Court to address that issue, I will decide that one too. But I really want to look toward the future.

MS. JOHNSON: Yes, sir. We think that children are best served by looking to the future. The only thing I would ask Your Honor is if there is some way to look at the order of [31] reference to make it consistent.

THE COURT: No, now, I'm going get to that in a minute.

MS. JOHNSON: Okay. Sorry, Your Honor.

THE COURT: The special master, because of the issues raised, and to prevent any collateral issues, the special master will no longer be the special master in the current role. He will be as an expert witness.

The court notes that in a seventh circuit decision that was cited and relied upon by the defendants in their motion, Edgar v. KL, 93 F3d 256 (7th Cir. 1996), that when the seventh circuit ordered recusal of a judge in that case, the court stated at page 262:

We leave it to the discretion of the replacement judge whether plaintiffs may call members of the panel as their own witness, and to introduce its report as their evidence, and whether the behind the machine machinations make even that use improvement.

To complete what the court – his sentence.

I don't think there's anything here remotely close or even suggestive of what happened in the Seventh Circuit. But from that language, the Court believes that it would be appropriate here, to avoid any of these collateral issues that that interfere with providing children what they need, to let the current expert be a witness who is available to the parties to testify on the current plans. Based upon the noncompliance, [32] with the prior findings over the last eight years of noncompliance, the court at this point will provisionally require the state to pay for the time extended by the former special master and its experts.

Now, recognizing the extended period of noncompliance and the need for a monitoring mechanism, the court engaged in some research in this area. Rule 53 is not the exclusive province under which the Court can appoint a person who needs assistance. The united States Supreme Court has recognized that the Court has inherent authority to appoint a person to assist the Court. And once the Court has the hearing and can evaluate what plan is appropriate, and what the problem areas are, at that point the court will take up the issue of the appointment of a monitor and afford the parties an opportunity to be heard on the scope of the monitor's authority and what functions the monitor will serve. And that will be an appointment under the inherent authority of the Court, not Rule 53 as amended, nor under the rule of provision of Rule 70, nor under the All Writs Act.

Are there any other matters either side wants to raise?

MS. JOHNSON: Your Honor, I just have a question about if the state will be producing their plans in 30 days, will that special master have access to documents that he has requested and has not been provided?

THE COURT: Now, I notice in your – whatever documents [33] the special master previously requested, and whatever documents that you have outlined in your motion, I will ask you to incorporate those into an order that I want to ask you to prepare, and I will order them to be produced.

* * *

[36] MS. JOHNSON: I just have one other question. Actually, I think it answers the one. Is it okay to do it right now, Your Honor?

THE COURT: Yes, ma'am. Whatever it is.

MS. JOHNSON: In terms of the State's plan and our response, which the special master does not have access to, because they were filed under seal, would it be appropriate for that –

THE COURT: Since they are experts, I want you to prepare an order, another order, because they are now in a different capacity. When they were special experts under the law, they were quasi-judicial officers. But now they are just going to be plain experts. And as plain experts, I want an [37] order reflecting that they have read the provisions of the agreed order, they agree to be bound by it and submit to the jurisdiction of this court for the enforcement of the agreed order.

And after you prepared that agreed order and they sign a statement that they have read it, and agree to be

bound by it, you may give them the information. And that applies to anything filed under seal.

MS. JOHNSON: Thank you, Your Honor.

THE COURT: That they need.

MS. JOHNSON: Thank you, Your Honor.

MR. KIRK: Your Honor, if it would make it easier on that, we have no objection to –

THE COURT: No, sir. I'm doing this.

MR. KIRK: Yes, sir.

MS. JOHNSON: In terms of the scope of discovery, with respect to the questioning of the experts, will there be questions allowed?

THE COURT: No, I appreciate that. There will be no questions posed to the expert on any communications between the expert and the Court. The issues for which the experts will be questioned are the plan that they submitted or the portions of the plan in which they participated, to understand how it would work, and the key rationale.

But there will be no questions of any experts [38] concerning any communications with the court. It is a matter, I said earlier, that is moot. I am considering, and have not yet decided, as to whether to have a magistrate judge supervise the taking of those depositions. And I will consider – I'm still evaluating that. And if there are – the special masters would also be precluded from being asked about any statements that were given by any representatives – by any plaintiff, plaintiff representative, or plaintiff counsel, or given by defendants, defendant's counsel, or

any agent of the defendant that was given in a confidential context.

And if the expert is going to rely upon anything that the expert is quoting the State for, the expert is going to be required to identify some public document, some public testimony, or some other basis other than his conversations with the State officials, because Judge Nixon made it very clear that he wanted – when the experts were special masters, and agents of the special master, that he wanted them to be able to meet and conciliate and to inform. They are no longer serving that role. But I do want to preserve the confidentiality of any matters disclosed in confidence under the expectation of confidentiality.

So there will be no confidential communications inquired about nor testified to in these depositions of the experts. And I will prepare an order that reflects the limitations on the depositions. So if the magistrate judge [39] presides, the magistrate judge will have guidance on how to take up any objections, and, if necessary, the court will be available on a short basis to resolve it if the magistrate is unable to do so.

MS. JOHNSON: Your Honor, would the discovery be limited to the experts – to the special master and his experts, or should we be taking – the plaintiffs be taking the deposition of State officials as well?

THE COURT: That's going to be a matter for the plaintiffs to decide. What I am putting on the table, I think we should not lose what everybody spent so much time and effort on, and that is the two plans that were submitted to the court. one attached to Judge Nixon's order, and one that was filed under seal. 465 I think is the

docket entry for one plan, and I don't have immediately in front of me the other. But there is one under seal.

And you all can – that's the reason I asked you the question earlier, what's your position. If you want that plan, it's a plan that this court is going to consider, so I would expect that the parties are going to want to depose the experts about that plan. But what you do is going to be really up to you. I'm not precluding you from starting to depose the other officials as soon as you feel you need to start deposing them.

MS. JOHNSON: Well, with the hearing, who would bear the burden of proof in the hearing?

[40] THE COURT: My initial inclination is that, given Judge Nixon's repeated findings of violations, and given that the consent decree imposes obligations on the defendants, that the defendants have the burden to meet of satisfying their obligations. I will allow the parties to brief that.

MR. KIRK: Thank you, Your Honor.

THE COURT: You are more than welcome.

MR. KIRK: If counsel is done, I have couple of questions.

THE COURT: Well, let's make sure. Are you done, ma'am?

MS. JOHNSON: Only one last one, Your Honor. Just the timing of when the state submits their plan in 30 days, will there be enough time –

THE COURT: I don't know that, ma'am. Judge Nixon asked them to submit whatever it is that they had,

and they filed it. I'm not sure. There has been all this confusion about plans and process and all that. So in an abundance of caution, I am giving them 30 more days to file whatever it is they want.

And once we see what it is they file, if it takes more than 30 days to discover that, you can apply to the court. But right now, we have eight years and a judge who tells me they have not complied as of this date. And it's now on my watch, and it's going to move.

[41] MS. JOHNSON: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. KIRK: The first question I had was understanding the precise rule that the special master and the experts have. Is the Court appointing them as the Court's expert?

THE COURT: No, sir. I stated – I'm allowing them to be experts available to the parties. They are not my experts. I am not appointing them as my experts. But I do find that, if the parties need them as experts, and, given their past capacity, and given the absolute need for them, and the fact that you all have not been compliant and have created the need for them under the Court's prior order, that at this point I require you to pay their cost, the cost of their services.

MR. KIRK: I understood that, Your Honor. The second question. Before they are deposed, will they be required to submit reports the way experts ordinarily are?

THE COURT: I would think that the plans – the purpose of deposing them is about plans they have already submitted. You know exactly what they think you ought to

do. So the purpose for which they would ordinarily prepare a report under Rule 26(a)(2) is effectively done.

MR. KIRK: Okay. Very well, Your Honor. Then that really brings me to the last point. As the Court noted, there were two plans in the record. The one that the Court referred to under seal is the one we submitted in response to Judge [42] Nixon's last order, and we'll appreciate the opportunity to expound on that in the 30 days –

THE COURT: No, what you filed recently you kept referring to as a process.

MR. KIRK: Yes.

THE COURT: So if you are now calling it a plan, that's fine.

MR. KIRK: I misspoke, Your Honor.

THE COURT: You went to great lengths to point out that there is no plan. There has been all this dialogue about no plan. So whatever your cards are, you are going to put them on the table, and we'll deal with it.

MR. KIRK: I appreciate that, Your Honor, and that was Judge Nixon's order, and we appreciate the opportunity to supplement.

THE COURT: No, even in response to Judge Nixon's order, there were these references, fairly snide, I might observe, about the work plan that Judge Nixon had ordered, and that you had found that what had been submitted was counterproductive, and it seems to me that it was ignored.

So who considers what a plan is up in the air to me. And so that's the reason I think it's important for you to

file whatever it is that you want, because we're going to have a hearing to determine compliance and what needs to be done, and we're going to have it on an expeditious basis.

[43] MR. KIRK: Very well, Your Honor. The second plan the Court referred to was the one that was attached to Judge Nixon's October 22 order, document 465, which, I want to make sure the Court is aware, that plan had been prepared by the special master and his experts. And it appears from the face of it, and from the face of the accompanying order, which I'm sure the Court is aware has since been vacated, it was clear that that plan –

THE COURT: Well, it was vacated not on the merits, but this order vacating the proceedings was because of this very public and – controversy over the TennCare plan and all of the litigation, and all of the collateral issues that that involved. That's my understanding of the context in which it was done. I don't want your remarks to be construed in any way that that plan was set aside because the Court didn't believe in the substance of it.

MR. KIRK: Your Honor, I don't believe that's exactly what happened. The plan was proposed in the October 22, 2004 order. The defendants, in the fall of 2004, objected to it on many, many grounds, including the merits of it. The Court, over the defendant's objections, put a moratorium on proceedings for a year. And then, on November 30 of 2005, the court held a hearing and subsequently issued the December 13 order which vacated the October 22 –

THE COURT: Yes, sir. But it did not relate to the [44] merits of the plan. And that's what I'm trying to get at.

MR. KIRK: I believe he said he vacated it because the plaintiffs had asked for it, so everyone was in agreement that it should be vacated.

THE COURT: Well, from my review, it was a plan that was a product of a lot of work, a lot of research, a lot of understanding of the issues, and I'm putting it on the table as something that this Court is willing to consider, and you can ask him about it.

MR. KIRK: And that brings me to –

THE COURT: But you can ask him under the conditions I have said and I will set out in an order.

MR. KIRK: And actually, the conditions, Your Honor, as said that I need to raise. I believe the record is clear that this plan was produced over the summer of 2004 during the period of the communications in question. And the Court has indicated that we will be barred from questioning the witnesses about those communications, even though it appears that it was part of what went into the creation of the plan the court has considered.

THE COURT: The plan is prospective in effect.

MR. KIRK: Yes, it is, Your Honor.

THE COURT: And because it is prospective in effect, you really want to know how it's going to work, what is its purpose, and – but asking – and there is no limitation on you [45] asking that. What you can't ask is what did Judge Nixon say to you about this, what did you say to Judge Nixon about that. That's in the past. That's not prospective. That has nothing to do with future compliance. What is important is, is the plan valid? Does it

have merit? Will it be effective? And those are the real issues.

MR. KIRK: Your Honor, respectfully, we would ask to be able to also, as we would of any expert, ask questions about what went into the creation of the plan.

THE COURT: Well, we're not in the garden variety civil lawsuit.

MR. KIRK: That's true, but –

THE COURT: And those are, my orders. And as a matter of fact, there is a Fifth Circuit case that specifically addresses where a lawyer wanted to make inquiries of a special master alone and the Fifth Circuit said you couldn't do it.

So I understand you want to do it; you have been making it clear to Judge Nixon you wanted to do it; you have made it clear to me you want to do it, and I'm telling you, you are not going to do it. If you don't like it, you can appeal it.

MR. KIRK: I understand. One last point, and it's really just for the record, and I don't intend to argue it, the court has made reference several times and read a number of documents indicating that the State is not in compliance. I believe Judge Nixon did find that in 2001, and there were [46] similar findings in the vacated October 22, 2004 order. And there was a reference, a summary reference, to that in the recusal order. I would just want to note for the record that the State –

THE COURT: He said you had made progress. He didn't say you were in compliance.

MR. KIRK: I'm sorry. I believe he said we were not –

THE COURT: And I quoted the provision of the order that said that you all had made progress. Nobody is denying progress. The issue is compliance.

MR. KIRK: I appreciate that, Your Honor. All I would like to note for the record is, notwithstanding the statements that the Court has read from Judge Nixon, –

THE COURT: Well, what else? I'll read it out loud. You tell me what paragraph you want me to read, and I will read it. If that makes you feel better, I'll read it.

MR. KIRK: Your Honor, it's not necessary for you to read it. I just would like the Court to –

THE COURT: No, I want the record to be clear, because you are suggesting the record is incomplete. So you tell me which paragraphs of docket entry 584 you want, and we'll put it on the record. Because I don't want to – I thought I raised – I went – as I said, I went through this because there are so many references that plaintiffs were asking for obligations that you are not obligated to make because there has been no valid [47] adjudication of anything. And so that was the reason for going through those remarks. And as you can look, it's a considerable sum of paper. And it was very difficult – it would I think bore everybody to death to read every sentence and every order and every page. So I tried to read those that I thought most pertinent. But if there is anything you want read out of the order vacating or the order earlier of 2004, I would be more than happy to read it.

MR. KIRK: Your Honor, there is nothing I want read. I would just like to note for the record that it is the

state's view that they have been in compliance with the consent decree.

THE COURT: Okay. Well, no, let's be clear about it. Where in docket entry – in what court order is language that you are in compliance with the consent decree? I would very much like to see it.

MR. KIRK: Your Honor, I'm not representing that the court has found that. I'm representing that that is the State's position.

THE COURT: Oh, I was not in any way attempting to suggest –

MR. KIRK: I didn't think you were.

THE COURT: But I think you have made it clear that you are not, but you made a reference to some other statements in the orders, and I was going to make sure that this record was complete and full, so if there is something else you want me to [48] read, I would be more than happy to read it.

MR. KIRK: I thought Your Honor fairly summarized the record. I just wanted the Court to know what our position is.

THE COURT: All right.

MS. JOHNSON: Your Honor, just to clarify the record, the excerpts that the Court took from the vacated ruling were based on Mr. Martins' and Mr. Goetz's depositions, which are in the record, and which do admit noncompliance in 2004. So the order may be vacated, but the underlying factors are still in the record.

THE COURT: As you can see, I have ordered some things, I have dealt with issue of the special master, but I don't think I can do any of that without letting you all know the basis upon which the Court came to the views that I have now. And that was the purpose. I'm not trying to embarrass anybody. I'm not trying to do anything of that sort. But it's obvious from reading these papers that there are serious and ongoing disputes about whether there is a plan or not, whether there is a valid adjudication of whether there is compliance or not, and that's why the Court felt the need to go through all these orders and memoranda, so you can at least know where I am and the basis for what I have done. So that was the purpose. So I don't think there is any doubt the Court consistently found noncompliance.

MS. JOHNSON: One other point, just to clarify the plaintiff's position about the October 22 order. Mr. Kirk [49] stood, on the day that it was being discussed before Judge Nixon, and said, as long as the October 22 order stands, that the discovery motions to basically go after the special master and the Court would continue. At that point, the plaintiff said we would move to vacate the October 22 order so as to moot this, frankly, witch hunt against the special master of the court. And obviously, that didn't moot it in their minds, so I just thought that it's important for the court to have that context.

THE COURT: Well, the way his remark was made, I didn't want anybody to leave anybody with the impression that that was vacated on the merits and found unacceptable in some way. And that was the only concern that I had.

MS. JOHNSON: And we were clear on that day that we did not concede that it was proper to be vacated. Just that we were agreeing to, in return for the end of the discovery, which we didn't proceed.

* * *

[51] REPORTER'S CERTIFICATE

I, Peggy G. Turner, official Court Reporter for the United States District Court for the Middle District of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the stenograph machine the proceedings held in open court on February 10, 2006, in the matter of B., et al v. Menke, case no. 3:98-0168; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript, pages 1 through 50, is a true and accurate record of said proceedings.

This the 11th day of February, 2005.

S/ Peggy G. Turner, RPR
Official Court Reporter

Office of the Special Master
August 2, 2004
John B vs. Goetz

Status Report

Given the issues that emerged at the last Status Hearing on May 20, 2004 and subsequent actions by the parties, I have prepared a Status Report on what I believe to be key issues if the Consent Decree is to be substantially implemented.

Previous Reports and Concerns

The Court and both parties have received three previous reports and relevant summaries are made here.

Mediation Report: Both parties, working with the Special Master (SM) identified several key problems in achieving Consent Decree compliance. These issues are included in Attachment A. The TennCare (TC) System itself has been going through significant upheaval, including such changes as closing down large MCOs, an impending "moratorium" on capitation and departure of the TennCare director, and the lame duck status of key officials. The persistent opposing claims of each party regarding how many of the Consent Decree mandates are in compliance is a reflection of the failure of mediation efforts. As a solution, the SM recommended itemizing each of the mandates, incorporating measures of compliance, then assessing compliance for each, and tracking any out-of-compliance mandates forward until general compliance was achieved. This recommendation culminated in the August 14, 2002 Court Order authorizing this Office of Special Master (OSM) and the Itemized Assessment Protocol (IAP).

Paragraph 52 Concerns: After the second IAP was received by the OSM, it became apparent from its content that the State persisted in claiming erroneously high Adjusted Periodic Screening Percentage (APSP) rates for children in custody even after those claims had been discredited at trial and specifically challenged by the OSM on a site visit, at a Status Hearing, and in other meetings. At the Court's request the OSM submitted a report. In response, the State planned and made several system changes, such as forming the Governor's EPSDT Coordinating Committee (GECC), chaired by Ms. Tam Gordon, to coordinate interdepartmental EPSDT efforts and, rather abruptly shifted all admission screens for children placed in the Department of Children's Services (DCS) from TennCare Select pediatric physicians or nurse practitioners to the Department of Health (DOH) nurses. While the SM acknowledges the numerous capabilities of public health nurses, discussions with practicing pediatricians and site visits by OSM experts have raised questions about the quality of and mechanism for ensuring adequate screenings and case management (CM) for these most vulnerable children. State responses and OSM queries and monitoring are ongoing and have been interrupted by the current Court proceedings.

IAP Performance Concerns: After the OSM received the third IAP, a Status Report was submitted to the Court and docketed #344. That report reviewed Consent Decree and IAP compliance for the preceding year. It was critical of the State's compliance with the IAP, the Consent Decree, and the quality of responses to Queries and Requests generated by OSM from IAP testimony. It concluded with recommendations that the Court consider contempt unless State IAP and Consent Decree performance improved.

Neither performance substantially improved. The subsequent fourth IAP was loaded with repetitious unread boilerplate. When department heads were queried by the SM at the November 2003 Status Hearing whether they had read their sections or not, one said it was not "my job", another said "no, it's too big to read", a third said "some" but got the specific item wrong. Subsequently, at the SM's request the State required its key officials to sign that they had read the IAP documents they were submitting.

Current Report

The current report reviews both the encouraging activities and events that have occurred since the previous report, #344, was drafted, circulated, and submitted. The report ends with conclusions and recommendations.

Encouraging Activities and Events: IWPs have consistently improved. The State has taken care to specify timelines and delegate responsibility for 105 items that were solicited from and submitted by advocacy groups subsequent to the previous Status Report. With the suggestion of and participation of the State's EPSDT Consultant, Dr. Henry Ireys, "Work Groups" have been formed and linked to Committee Structures. Dr. Ireys, in his April 30, 2004 report, links these Groups together in a strategic and sequenced manner. His report contains many excellent recommendations. A work group on Outreach was formed first and submitted suggestions and plans to the GECC. While recent monitoring of these meetings has been suspended, the SM has observed the beginnings of Departmental interchange and communication necessary to achieve Consent Decree compliance. The SM has

observed problem solving, thoughtful exchange of information.

Second, a TennCare/Tennessee Chapter of American Academy of Pediatrics (TNAAP) Advisory Committee (TTAC) has been formed to receive the reports of Screening Guidelines Committee (SGC), and the Provider Relations and Educational workgroups. The Advisory committee, chaired by Dr. Conrad Shackleford, has strong representation from the pediatric provider community. Since January it has approved updated screening guidelines developed by a reconstituted SGC (Consent Decree ¶ 44f). These guidelines now include Behavioral Screening Guidelines recommended by a "MCO/BHO Interface Committee" and adopted by the TTAC. TC adoption of these guidelines had not yet been finalized as of the June meeting. Subcommittees not observed by the SM do much of TTAC's work. Nevertheless, the reports are crisp, and actively reviewed by the TTAC members who, so far, achieve high attendance and participation rates.

Third, the State reports that the CMS 416 screening ratio/administrative rate (AR) has improved from 54 percent in FFY2002 to 62 percent in FFY2003. If not a calculation error or re-classification artifact then this is a remarkable, welcome, unexpected, and unexplained increase. It is remarkable because it represents an accelerated rate of increase. The 4-percentage point total rise between FFY2001 and FFY2002 from 50 to 54 percent represents an 8 percent annual growth rate whereas the 8-percentage point rise from 54 to 62 percent represents a 15 percent annual growth rate. It is welcome, for as long as the medical record review (MRR) does not decline at a commensurate rate, the APSP rate will rise. The most recently available results from the medical record review (MRR)

component, which measures the completeness of screening exam by reviewing actual medical records, is reported to be nearly 80 percent. If this holds for FFY 2003, the tentative APSP is about 48 percent. This means that complete screening examinations for children are being performed at a rate that was said to be impossible by many State officials, legislators, and MCOs since the Consent Decree was ordered. Sixty-two percent is as unexpected as 54 percent was two years ago. FFY2002-3 were years of TennCare turmoil and chaos. As the period began, the State and Plaintiffs had just completed arguing their case. The December 2001 John B. Order was near, mediation occurred, three MCOs were closed, the State transferred large numbers of enrollees to TennCare Select, a fee for service moratorium was put into effect, Administrations and TC Directors changed, the Children's Health Initiative, a structure erected to coordinate State Departments, was abandoned and not replaced, and a full-time TC medical director had just been employed. And, according to State officials, IAPs and IWPs so sapped their time and energy that they could not really attend to the Decree. There was no outreach and no fee increases. If there were to be a similar growth rate in FFY2004, then the AR will be over 71 percent – seemingly without doing anything at all!

So, something must have happened and it happened a while back! The trend is exponential suggesting major changes in policy and practice may have occurred. One possible explanation is the closure of the three MCOs. Two of these paid primary care physicians (PCPs) on a capitation basis and their billing of EPSDT encounters cost them time and effort. Another candidate is coding procedure changes, in which screens are performed at sickness visits and billed as screens. Next, DOH became much more

active beginning in FFY200I and, with access to new financial resources accelerated their growth from 7,000 visits in 2001 to 28,000 visits in 2002, a growth rate of 300 percent. In fact, the additional 21,000 DOH visits may account for as much as 75 percent of the 4 percentage point increase that occurred between FFY200I and 2002. If a similar acceleration in DOH growth occurred in FFY2003, then this might explain much of increase. At the April 13, 2004 TTAC meeting Annette Goodman, representing DOH, reported the DOH was now screening 5,000 children a month, double that of the previous time period. When linked to an appropriate denominator, the rapid growth rate in DOH screens might, once again, explain a large proportion of the 8-percentage point increase that occurred between FFY2002 and FFY2003. For now, though, the genesis of this added momentum is unexplained. During the SM's monitoring to date, no explanation of these dramatic increases has been provided by the State. The exponential rise since FFY2001 does not fit with information received from CPORT, TNAAP, DOH, reviews of DCI and TennCare network adequacy reports, or Current Procedural Terminology-Resource Based Relative Value Scale (CPT-RBRVS) time factors for EPSDT examinations. If this increase has occurred primarily in rural counties, it would fit with and the primary locus of practice by DOH – rural areas. Previous DOH reports document a mismatch between the availability of PCPs and TC enrollment in rural areas. Hence, previously underserved children may now be receiving screens, mainly by public health nurses. And, as discussed above, previous queries, as well as site visits raised some questions about the completeness and quality of such screening. It is not known whether independent medical record audits occur and what their results show. To answer those

questions the SM requested and received the claims records of DOH screens for fiscal 2001 and 2002. Limits on time and other resources have not yet permitted a review of medical records by the SM and his experts.

Fourth, re-organization has started. At the GECC it was reported that TC had approved two types of DOH outreach positions and that these positions were in the Governor's budget. One position, a community health coordinator, a professional position, was to coordinate outreach for a given county or regional health, department. The second position, a lay position, was to be employed by the county health department. The SM requested, in writing, both job descriptions on May 26, 2004 but has not received them. In a separate initiative to improve verbal outreach a Call Center has been approved, space located within DOH. Hiring and training plans were in place to open the Center without delay. However, the OSM is unable to confirm this opening and the operational functioning of the Center due to the current Court proceedings. The fact that, these outreach activities and events were essentially part of IWP 3, prior to hiring consultant Dr. Ireys and prior to creation of the advocate's 105 problem list and were ported thru IWPs 4, 5, and 6 to near fruition is an encouraging example of State engagement and follow through.

Fifth, it was reported at the GECC that the Governor's Office has created new EPSDT staff positions, including four nurses and an administrative assistant, to coordinate EPSDT efforts. It is not as yet clear how this staff will be used in interdepartmental coordination. After this report the State announced that Manny Martins would leave his position as TennCare Director and would direct an "Office of Children's Care" out of the Governor's Office.

Finally, the Governor, with Blue Cross-Blue Shield and Vanderbilt University financing, commissioned the two part McKinsey Report which contained many potentially valuable ideas for solving TennCare's financing problems. Many of those suggestions were adopted into enabling State laws. Of the many excellent McKinsey Care Management suggestions affecting the CD, one, evidence-based medicine (EBM), was inscribed into law. If defined and implemented as intended by the originators of EBM, Sackett, et al. Churchill Livingstone, 2000, this could become a powerful EPSDT cost saving and health status amelioration and mitigation tool. However, we remain concerned that the evidenced-based medicine criteria may be used by the Defendants to withhold appropriate treatment for TC enrolled children. Careful monitoring will be needed to ensure the EBM approach taken by the state is used appropriately and in a fashion that is consistent with the Consent Decree and EBM.

Limitations: There are some limitations to the above encouraging activities and events. First the IWPs, while consistently improving in specificity, do not address many of the Consent Decree's mandated paragraphs. With the switch in format between IWP 3 and IWP 4, submitted 4/29/03 and 11/19/03 respectively, the specific linkage of paragraphs to plans was obscured. In the former each of the 146 Consent Decree paragraphs was accounted for, while in the latter, the list of 105 Problems address only 28 Consent Decree paragraphs. Even though the April format included brief summaries of Consent Decree paragraphs, the accounting was often incomplete. Some of the brief summaries are accurate but many of the brief paragraph summaries omitted important qualifications. Nevertheless, the State claims as late as May 3, 2004 TDAG Letter

"clarification" 5 that this mandate is "Done". Paragraph 41 (1) mandating dental services be performed by dentists, does seem in compliance and "Done" may be appropriate. However, the brief summary of ¶ 44 in IWP 3 states the mandate as "Establishment of Screening Guidelines Committee – "actually refers to a set of six sub-paragraphs, 44 (a-f), many of which (see TTAC discussion above) are still in process. The brief summary provided in the TDAG letter omits the relevant content contained in the sub-paragraphs. At the present time, implementation of those mandates is not complete. Of special interest is the monitoring component. It states, "ensure that each periodic screen accurately identifies children who should be referred for further assessment . . . " this is not at all "done" and directly affects the quality, if not the quantity, of screening. As a third example, with the exception of Problem 71 of the 105, which is linked to ¶ 47, the later IWPs do not address the APSP/DSP paragraphs, 46-52, of the Consent Decree. This systematic exclusion by the State from either the IWPs or the IAPs of one of the key outcome sections of the Consent Decree, led the SM, after 15 months of forbearance, to request a APSP/DSP Plan within 20 working days at the November 21, 2003 Status Hearing. Partially or wholly omitting Consent Decree mandates is a major weakness in the State's planning procedures. Thus, even if the current 105 IWP problems are solved within the timelines stated, the State will still not be in compliance with the Consent Decree nor EPSDT law since many mandates are either not fully addressed or not addressed at all.

Second, goals are not defined in measurable or operational terms in the State's IAP *before* embarking upon plans and activities. This is true for the Outreach initiatives

mentioned above as well as for the "re-organization" now under way. At present, neither the State, the Plaintiffs, nor the OSM will know if the initiatives are meeting expectations well, very well, or not at all, since no expectations are stated. In short, success and failure are not yet operationally defined. Likewise, goals for the new Office of Children's Care appear undefined in measurable or operational terms. Will re-organization succeed? Are the measures of its success cost savings, compliance with the Consent Decree, healthy employable tax paying adults, or what? These outcomes are within the grasp of the State to measure and monitor. The OSM has not yet received plans for spelling out the authority and responsibility of the Office of Children's Care, its relationship to the TennCare Director, the GECC, or the "Work Groups" recommended by the TC consultant, Dr. Ireys, etc. Not being informed about the Office of Children's Care changes, the OSM is uncertain what connection, if any, there is between the new office and the new EPSDT staff or the impact, if any, that this reorganization will have upon achieving Consent Decree compliance.

Third, the current system seems to guide and govern itself almost exclusively by financial measurements not health measures or compliance measures. For example, the Governor's *Blue Ribbon Report* of 2001 and the McKinsey Report of 2003 deal almost exclusively with financial outcomes. Even in that context, these reports, while containing some excellent analyses and recommendations, fail to adequately compare the rising costs of TennCare services to the rising costs of health services for Tennessee or the nation,. New technology in the form of drugs and procedures probably cannot be mandated or managed away. Nor, is it possible for the State to manage away the

inefficiencies of the current splintered health care delivery system. The "CAGR" rate, calculated to estimate the rate of TennCare expenditure growth based on the past expenditures and applied it to the future, is postulated at 11% in the McKinsey Report and drives its dire predictions and somber recommendations. The Report fails to note that: 1) the hefty 9.3% growth rate for Tennessee was true for the nation as a whole in FFY2002; 2) the recent growth rate in Medicaid is a nationwide phenomenon related to the recent recession and is expected to decline; 3) relevant cost factors need to be included in projections related to John B compliance and the affected class; 4) the calculated costs exclude savings related to the amended Grier Order. On May 11, 2004, the TC medical director reported to the TTAC that the Tennessee Drug List (TDL) adopted as a result of those Grier amendments has saved upwards of $150 to $175 million in the past year alone; and, 5) none of the recent State "reports" take into consideration savings in social welfare spending resulting from TennCare. Medicaid, itself was a response to the high rejection rate of young males for military service induction because of conditions that were preventable in early childhood. The savings related to the purpose of EPSDT, the heart of the original Medicaid legislation, are simply not addressed – as if they do not occur or are irrelevant. Thus, exclusion of appropriate comparisons, projections, classes, known savings, and appropriate conceptual frameworks to properly account for costs *and* benefits, undermines the dire predictions related to the McKinsey Report that predicate much of the current TennCare decision-making.

In summary, current initiatives, screening successes, and plans are encouraging but limited by lack of a conceptual framework or real plan, failure to incorporate crisp success

measures, the absence of analyses or distorted analyses, and lack of awareness of data that exists within the State's own grasp. Evidence for measuring the sources of success and preventable conditions is present in the claims databases of TennCare and other State Departments. Such data should be identified and used as an effectiveness guide to the TennCare System.

Discouraging Activities and Events: Notwithstanding the efforts and successes listed above and the promises made for the future, three major issues dominate this report, the failure of the State to produce a screening plan when ordered to by the Court, the failure to produce a minimal quality IAP, and without notice to the Court, crafting legislation that could nullify the Consent Decree and EPSDT law.

Failure to produce a Screening (APSP/DSP) Plan: The State failed to produce a plan on April 30, 2004, as requested by the Special Master upon instructions by the Court. This failure re-emphasizes previous finding by the Court that "TennCare is a failed system". Given over 18 months and five opportunities to produce an IAP, or an IWP with a plan to carry out its responsibilities and finally, four opportunities between August, 21 2003 and May 30, 2004 to focus specifically upon such a plan, the State failed to produce a plan. Instead, a document entitled, *"The EPSDT Program in Tennessee: Strategies for Enhancing Screening Percentages"* was submitted. In the second paragraph of its executive summary, page v, the document characterizes itself as a report. The entire document of 40 pages did not once use the term "plan". The report was produced with only one set of three "scenario" timelines from which the reader presumably was to choose, a short, medium, or long time to achieve

APSP/DSP Consent Decree compliance. In contrast to a communication just prior to the dateline, the cover letter to the Ireys' report the Tennessee Deputy Attorney General (TDAG), Linda Ross, also never used the term "plan" or any synonyms but instead characterized it as a "revised version of the material" presented previously, with the added objection that the request "involved intrusion into matters that fall within the realm of the State's . . . prerogatives and authority".

Nevertheless, after the above obvious weaknesses were discussed with the TDAG, the State subsequently chose the short, 5 year, timeline and claimed at the Status Hearing of May 21, 2004 that the document was indeed a "plan". Given the State honestly believes that this document is a plan, then it is reasonable proof that the TennCare system, is and will likely remain in disarray. Given the State knows that the Ireys' document is in fact not a plan, then objecting to requests by the SM for a plan on the basis of "intrusion" is merely a mask to hide a failed effort. In any event, no feasible plan yet exists to achieve compliance for an indispensable section of the Consent Decree. At that May 21, 2004 Status Hearing the SM accepted marginal addendums to the Ireys' document and queried the TDAG on the meaning of intrusion given the State elects to show no measurable progress towards fulfilling most provisions of its agreement. Because the TDAG answered that intrusion would occur if the SM kept rejecting "plans" until he got the one he wanted, the answer to the SM seemed Delphic. It is an intrusion to request a plan and an intrusion to not accept a non-plan. Hence, the State claims the prerogative and authority to keep presenting non-plans until the SM relents. See Attachment A for correspondence related to this failure

and Attachment D for the experts' reviews of the second version of an APSP/DSP plan and email comments on the Ireys' report's identity as a plan.

In sum for the APSP/DSP plan, the State has repeatedly chosen to avoid their commitment made in the Consent Decree and claims intrusion at any attempt by the OSM to get it to provide a plan for achieving compliance.

Failure to produce a minimal quality IAP: Answers to questions, responses to requests, and timely receipt of accurate and reliable data and information, are essential for the Special Master to monitor the Consent Decree and determine the extent of compliance by the defendant. Thus, if questions are posed to a party that chooses to ignore, partly answer, refuse, or falsely answer, that party effectively nullifies the capacity of the SM to monitor the Consent Decree. In this case, the SM under direction by the Court produced an outline for an IAP that corresponded to each mandate of the Consent Decree. For each mandate a series of procedural questions common to managing most large projects or programs were posed for the State to answer. A brief history of IAP non-compliance follows.

> IAP 1, October 2002: was riddled with citation errors; was not read by responsible State officials; omitted any reference to current or previous plans; documented widespread confusion and non-compliance with the Consent Decree mandates (e.g., paragraph 39a re: effective and aggressive verbal and written outreach and paragraph 52 re: APSP, complete screening, for children in custody); no queries about past or present plans were answered; no queries about data processing or quality were answered; and,

no queries about program evaluation were answered.

IAP 2, February 2003: fewer but still frequent citation errors; was not read by responsible officials; content was essentially unchanged; no compliance progress was demonstrated, even after the SM conducted a workshop on GANTT and PERT Planning at the invitation of the State; no queries about past or present plans were answered; no queries about data processing or quality were answered; and, no queries about program evaluation were answered.

IAP 3, July 2003: the format was radically changed by the State even given specific disapproval by the SM; non-compliant material was added and compliant answers deleted; it was still not read by responsible officials; the content was radically altered but essentially unchanged, and little progress towards compliance demonstrated; no plan, data quality, or program evaluation queries were answered.

IAP 3.1, July 2003: Non-compliant material removed; ibid IAP 3 above.

IAP 4, November 2003: citation errors were reduced by repeatedly including verbatim, whole documents; the IAP became more non specific; content was essentially unchanged from IAP 2; no progress in compliance was demonstrated; a new tracking and grading method was implemented by OSM that was independent of IAP content; plan, data quality, and program evaluation queries continue to go unanswered even though answers to plan queries are re-requested; officials had not read their sections and commented that the documents were "too

big", "not my job", or were unfamiliar with the contents.

IAP 5, May 2004: citation errors are infrequent; the voluminous repetitions are minimized; the entire document is submitted electronically; the remainder of the content remained unchanged; again, plan and data queries were not answered, even though repeatedly and specifically requested; IAP 5 was rejected by the SM for not complying with the IAP Court Order, see attachment B for reasons; the State claims that the OSM deleted parts of their previous IAP testimony and then, upon being challenged, retracts their claim; and, the SM delivers a verbal and written response to the State's clarification queries. Again, it was pointed out to the State from their own RFP requirements for contractors that they know very well what constitutes a formal plan and GANTT chart.

IAP 5.1 Resubmission, June 2004: the State refuses to honor SM order to declare compliance or not for each item and to answer data quality queries, claiming intrusion, etc.; some plans added but only those corresponding to the 105 problem set not the Consent Decree paragraphs; with inclusion of plans, some progress towards compliance is documented and is noted above; however, an evaluation or explanation of the improvements in screening rates mentioned above is not presented; the major content remains unchanged: See Attachment B for sequenced correspondence about IAP 5.

In sum for the IAP, the State has failed to honor its renewed commitment to produce an IAP satisfactory to the SM made September 2004. It still refuses to engage its key

officials in planning efforts to achieve compliance, verification of the quality of its data, and evaluation of the successes or failures in attaining compliance. Claims of intrusion by the SM are used to mask these failings by the State

Enacted a law with potential for negating the medical necessity definitions of the Consent Decree: Since beginning mediation through the reviews of the IAPs, cited laws, rules and regulations, TennCare Standard Operating Procedures (TSOPs), and the MCO and BHO contracts, the SM has been very concerned that the references to medical necessity (MN) as plainly stated in the law and Consent Decree, are not plainly represented in these documents. Because the MN definition determines if a given diagnostic or treatment service will be covered, it is the *sine qua non* of coverage, EPSDT law, and the Consent Decree. All of the services mandated by the EPSDT law and the Consent Decree are unavailable if not medically necessary. Obliterate or severely weaken the definition of medical necessity, and one obliterates or severely weakens the law and Consent Decree. All the IWPs and IAPs, and screenings in the universe cannot compensate for degrading the EPSDT definition of medical necessity. Hard compromises were made to enact the legislation; something was traded in return for preserving and improving the health of the nation's children. Concerned that the ambiguity and the correctness of the definition that finally made it to previous MCO/BHO contracts would be retained in upcoming BHO contracts, in the summer 2003, the SM searched the BHO RFPs, noted retention of ambiguity in the definition of medical necessity, requested the Department of Mental Health and Developmental Disabilities (TDMHDD) to notify bidding

contractors of the Consent Decree, and in 2003, issued a special query regarding the status of the Consent Decree medical necessity provisions in the contracts and TennCare implementation and administration process. In response to the query, the TDAG, Ms. Ross, cited a one sentence "catch-all" clause in those contracts that holds the MCOs and BHOs accountable to any State or Federal law, including Consent Decrees, TSOPs, etc. In response to the SM's second request to notify current and prospective contractors about the Consent Decree in response to the virtual absence of the Consent Decree's medical necessity standard from TennCare standards and operations, the TDMHDD attorney sent a letter inferring the State was in compliance with John B. Nevertheless, so many problems were presented at trial and continue to present themselves over the scope and definition of medical necessity, that the SM specifically employed a Medicaid legal expert, Ms. Sara Rosenbaum, to track compliance with Consent Decree provisions through the MCO/BHO contracts especially the pending BHO contracts. She cited several further areas of ambiguity and her reviews are attached.

During the time period of the two failures discussed above, the State pursued its mission to follow up on the McKinsey report with TennCare reform. The SM received part two of the McKinsey report on February, 4th, and attended a McKinsey presentation conference on February 11th. The reform plan was announced to the news media by the Governor's address to the legislature on February 17th. Since the website-published plan called for drug and other limits to mandated services as well, the SM queried Ms. Tam Gordon, the State GECC chair, on March, 16th about some of the details, specifically about the State's intentions to negate, via CMS waiver, the drug coverage mandate of

¶ 54k of the Consent Decree. Her reply acknowledged that a CMS waiver might be sought. It was made clear that the legislative proposals were to be kept confidential and thus could not be revealed to the SM. Then, at a retreat of OSM experts in March, TC Director Manny Martins, was queried about whether or not the State intended to seek a CMS waiver for Consent Decree ¶ 54k, the drug mandate. He responded by indicating that he thought the State was going to limit prescribed drugs just like the plan stated. Even when submitted to the legislature, the plan's proposals were not communicated to the SM. Finally, on April 7th, the SM obtained a copy of the proposed legislation from concerned advocates. The SM was shocked not only at the limits to covered services imposed by the bill, but even more so at the thoroughness with which the bill's medical necessity definitions, if and when applied to children, nullified the Consent Decree and EPSDT medical necessity definitions.

Ms. Gordon was out of the country and the TDAG was on family leave. Nevertheless, the SM immediately made his concern known to her stand-in, Senior Counsel, Ms. Sue Sheldon, who replied within the timeline requested. She cited the reference to the 1984 federal EPSDT regulations that had been incorporated into the MCO/BHO contracts since 2000. She was not able identify references to the Consent Decree or the 1989 EPSDT law, or even more generally, OBRA 89, which contained the EPSDT amendments, for her assurance to the SM that the State would "comply with the law". She also stated that the SM query was premature – evidently no law had been broken yet – and that even so, no law would be broken because of a clause in the legislation allowing exceptions for certain "services" and "items". A critique of the now legislated

medical necessity definition was drafted immediately and shared with the Court and OSM experts. From that critique a reply to Ms. Sheldon was drafted but not sent since it appeared further input from the SM was not going to alter events. On the cusp of legislative passage, Ms. Gordon returned, reviewed interim communications with the TDAG, and requested a one-on-one meeting with the Governor for May 3rd or 4th. The SM tentatively accepted for May 4th. However, that acceptance was withdrawn after consultation with Plaintiffs, the Court, and OSM experts.

Medical necessity definition issues were next addressed in the May 20th Status Hearing. In that meeting, which was transcribed, queries were put to the State regarding the medical necessity definition conflict. The State affirmed that a new definition was now in effect but the rules and regulations still needed work. The State offered reassurance it would abide by the law, and that at any rate it was premature to hear these matters because no changes had been implemented yet. The argument was that when something was, in fact, done the State would come back to Court and the process could continue from there. In essence, it was the state's position, first, that it was in compliance with the Consent Decree, and second, that even if its actions did not amount to compliance with the Consent Decree standard of medical necessity in either policy implementation or practice, the Court should not intervene until defendants have in fact secured federal waivers of the EPSDT medical necessity standard and have themselves (presumably) returned to court to seek a modification of the Consent Decree in order to weaken the current medical necessity standard.

Conclusions and Recommendations:

General Conclusions: The State has initiated some encouraging efforts to achieve Consent Decree compliance yet chooses to ignore its failures to find and fix fundamental flaws in its system that prevent it from achieving substantial compliance. It focuses itself on process instead of outcomes. It can't document for the Court where it's going because it doesn't choose destinations regarding issues that are basic to the performance of a child health system. Several examples, documented in previous reports and this report illustrate this conclusion. These include absence of valid and reliable measures of provider network adequacy outcomes, case management outcomes, outreach outcomes, information system outcomes, covered services outcomes, system level coordination outcomes, and finally health outcomes.

The first and most important example is the absence of clear network adequacy outcomes. The absence of clear goals and strategies for attaining network adequacy has been noted since trial, mediation, IAP 1, meetings with two Governors, presentation of the State's own DOH and CPORT reports at meetings and Status Hearings, and through OSM special queries and responses. This set of problems was documented in the September 2003 report and its status has changed little since that time. At the moment, the State seems to have progressed from complete to partial denial that current networks are substantially inadequate. As stated in September, the State's principal watchdog, the Department of Commerce and Insurance (DCI), hires the same company to assure network TC adequacy that TC hires to assure compliance with EPSDT . Perhaps not surprisingly, it has yet to detect a problem. The current annual DCI report was requested

twice in writing, but yet to be submitted. The TC Information Service (IS) internal quarterly reports to monitor network adequacy also remains inadequate. By the reports' accounting, one single MCO has the network capacity to serve six million Tennessee children. The State has conceded in ¶ 61ii for BHOs but not MCOs, and in Status Hearings, that a problem does exist with specialist and mental health network adequacy. If the recent unaccounted for increases in the CMS 416 screening ratio turn out to be attributable to the rapid increase in DOH activities, then the State remains in partial denial about primary care network adequacy. IAP 1 through 5 did not acknowledge any problems whatsoever and offered no plan to assess adequacy, other than referring to the DCI and internal reports. IAP 5.1 did incorporate a response to "How to improve network adequacy?" but that response states. "No known deficiencies identified by state or EQRO in this area."

The recently formed TC-TNAAP advisory committee has apparently recognized the network of specialists problem as well as, perhaps, the primary care network problem. While not documented in the IWP as one of the 105 problems, but documented in the resubmitted IAP 5.1 under Plans for a new working/subcommittee, the "Provider Education and Support/Participation" has been created to deal with these problems. Discussions of the advisory committee make it clear that members believe this to be a central problem. Lack of specialist networks has obstructed screening efforts. The incentive to screen, given inadequate referral networks is attenuated. Perhaps medical care network adequacy will follow the path of dental care network adequacy; from denial, partial denial, and acceptance to substantive action in the form of adequate

planning, resources, and monitoring. At the moment, neither the State nor its consultants are clear on the magnitude of network inadequacy because they haven't defined a measurable outcome. Many solutions exist to assessing measurable outcomes, for example, emergency room visit rates, TC entry to EPSDT or primary care service durations, fiscal, birth, or other starting point duration to care rates, comparing TC primary and visit rates to national and state population or commercial insurance rates.

For example, outreach is vital and important but the State has embarked on many actions that have yet to be framed in evaluation terms. All the activities have been planned before the purposes of those activities were envisioned in measurable terms. This is a general flaw in the State's system. What are the purposes of outreach? What are the purposes of screening? What are the purposes of EPSDT law? What is it we want to end with and how will we know we are there? What are the purposes of the IAP? What are the purposes of re-organizing the TennCare system? What are the purposes of defining medical necessity? What are the purposes of achieving substantial compliance with the Consent Decree? Even if one answers those questions from within financial models of thinking rather than health status models of thinking, one must answer those questions within time frames. What are the purposes of outreach within 1, 2, 4, 8, 16 years? And, if most purposes seem to end with saving tax dollars, within what time frame will we measure and achieve those savings? Saving tax dollars today is different than saving them tomorrow. A child born with a physical, mental, or social disability will cost societal tax dollars not necessarily today but inevitably tomorrow.

In addition, as State outreach initiatives were being reported and discussed, one of the committee members with a large TennCare practice opined in a May meeting, that appointments for well-child screening could not be fulfilled until September. In prior meetings, reports from different sources indicated waiting times are lengthy for well-child screening. At present, one cannot assess just how network inadequacy is affecting EPSDT screening rates. The reported administrative rate has increased since the trial date and has accelerated between FFY2002 and FFY2003, but it appears the bulk of this increase is due to recent increases in DOH screening levels. If this is the case, then it says much about primary care network inadequacy for screening If networks were adequate in the face of six years of prodding, screening rates would have significantly increased in the MCOs. At any rate, these remarkable increases in quantity and quality need verification since they do not fit with other indicators, such as CPORT reports, and site visits by experts. It is not at all clear from perusal of the TC professional database that DOH encounters are included. If not, then the main instrument for measuring quality, the Medical Record Review (MRR), may not be including the DOH screenings. Following a Court site visit to one rural health department, the issue of case management and follow-up quality was raised for DCS children. More work is needed to discern whether similar quality issues apply to other members of the John B. class. So far as the SM can tell screening network adequacy problems have not influenced outreach planning. This connection is certainly not documented in IAPs or IWPs even though queried in the IAP. When the current Governor asked the SM what he thought the biggest problems facing TC, the SM did not cite outreach, precisely because if successful, it would

probably result in negative reinforcement of recipient behavior just as the same phenomena occurs with primary care physicians (PCP).

Specific Conclusions:

The State remains non-compliant with the Consent Decree and the EPSDT law

State plans lack the formality that the State requires of its potential contractors.

State plans lack concrete outcome definitions and measures.

The State refuses to state or demonstrate that a given itemized mandate is in current compliance thereby effectively shifting the burden of proof to the SM or Plaintiffs and refusing to actively implement the particular CD mandate.

State plans for compliance lack logical linkages between and within CD mandates, e.g., outreach to screening, screening to specialist care, case management to screening or specialist care, etc.

State plans and legislation focus almost exclusively on the costs and not the health benefits of EPSDT.

State six-year non-compliance with the Consent Decree and EPSDT legal definition of medical necessity by repeatedly failing to change its contracts and its operational demands of its contractors has led to irreparable harm to its children's and adult's health,

State management information system (MIS) databases are unconnected even within the TennCare Bureau let alone across its cabinet departments

thereby thwarting the coordination and monitoring mandates of the Consent Decree,

State initiatives in the Governor's Office may lack the staffing skills necessary to effectively utilize a well functioning MIS and perform the evidenced-based outcomes analyses necessary for planning, coordinating, evaluating, monitoring, and ensuring compliance with most Consent Decree mandates.

The State refuses to use evidence-based methodology to effectively and accurately measure its network adequacy no matter what evidence of network inadequacy its own departments produce.

Recommendations: See OSM Experts' Memorandum and detailed recommendations.

MEMORANDUM

To: Dr. Richard Carter, Special Master, *John B*

Fr: Sara Rosenbaum, Marci White, Paul Newacheck, Larry Platt, and Burt Edelstein

Re: Consensus recommendations regarding further relief priorities in *John B*

August 2, 2004

At your request, we have held joint meetings to prepare a document setting forth our consensus recommendations regarding further relief priorities in *John B*. Our recommendations arise directly from the terms of the Consent Decree (CD) and represent our joint expert opinion regarding specific types of activities which, if undertaken by the state within a reasonable time period, would lead to documentable improvements in children's access to medically necessary health care at the screening, diagnosis and treatment stages. Several of our recommendations duplicate with more specificity the broad recommendations made to the State by its own expert, Dr. Henry Ireys. Where our recommendations parallel those made by Dr. Ireys, and others, we have shown what we consider to be parallel recommendations on the accompanying table.

We developed our recommendations as a consensus document because of the highly inter-related nature of CD's specific health care access improvement paragraphs. It our view, the CD has as its essential goal improving the accessibility and quality of health care for TennCare-enrolled children by ensuring that the state comes into compliance with the provisions of the federal EPSDT program. Our research and fact-finding for the Special

Master documents some progress, as well as areas in which the rate of improvement has been slow to non-existent. For this reason, we have identified a series of actions which, if taken in a reasonably appropriate time period, would lead to improvements in child health services. Our recommendations are based on numerous sources of evidence including our knowledge of the child health literature, our experience with health programs for children, and our opinions drawn from extensive experience with the TennCare EPSDT program.

Our consensus approach reflects the intertwined nature of pediatric health care. For Medicaid-enrolled children with EPSDT coverage to have reasonable access to appropriate health care as specified under EPSDT, evidence from child health research suggests that all health system elements must work well: health and dental examinations (i.e., screens) must be timely, accessible and of good quality; the supply of primary and specialty medical and dental diagnostic and treatment care for suspected physical and mental health conditions must be reasonable and available at the earliest reasonable time to avert long term consequences; the referral process needs to be timely and accessible; case management must be available for medically complex children; and decisions regarding the medical necessity of care must be made in a manner consistent with the preventive thrust of the EPSDT benefit. These elements of the EPSDT program are reflected in the paragraphs CD.

While we believe that all activities furthering the child health access terms of the CD are important, our recommendations, which are set forth on the attached chart, represent the specific changes which we consider to merit the highest priority by the Court because of their

potential to advance the overall goals, and specific provisions, of the CD.

Finally, in the case of medically necessary treatment (including medical case management) we recommend that the Court grant immediate relief which should be in place throughout the period of time between the entry of the order and Defendant's compliance with its terms. This immediate relief consists of approval of all recommended diagnostic and treatment services. In our view, this immediate relief is merited by the fact that as the TennCare program currently exists, its medical necessity standards and review processes appear to be in total nonconformity with the Consent Decree. In other words, there is no evidence of any progress in moving toward compliance. Indeed, recent legislation enacted by the Legislature suggests Defendants' unwillingness to apply the medical necessity terms of the CD to children. For this reason, we believe that this immediate relief is warranted, even as the state is provided with additional time to make necessary modifications to comply with the terms of the CD.

OSM

Office of Special Master

August 2, 2004

Honorable John T. Nixon
Senior Judge
United States District Court
Middle District of Tennessee
Nashville, TN 37203

Your Honor,

Enclosed is my Status Report as you requested. The Report reviews the major activities and events affecting John B children since the September 23, 2003 Status Report. The report includes assessment and conclusions. A plan of recommended actions developed by OSM experts is appended. I have reviewed and edited these recommendations. This plan represents a good and feasible plan with measurable endpoints. It is very non-intrusive. It is not exhaustive but provides a meaningful starting point for significant relief within the next two years. If implemented by the State and monitored with rigor by the Court, I believe it will result in monitored compliance of the most important mandates and a very good outcome for the health status of the Tennessee children protected by the Consent Decree.

Yours,

/s/ Richard A. Carter, MD
Richard A Carter, MD, MPH
Special Master

CC OSM Experts

EXPERT CONSENSUS RECOMMENDATIONS[1] REGARDING FURTHER RELIEF PRIORITIES IN *JOHN B*

RECOMMENDATIONS AND CD ¶¶'s	IREYS, MCKINSEY, GOVERNOR, AND OTHER REPORTS, RECOMMENDATIONS, & DEFINITIONS
1. IMPROVING SCREENING ACCESSIBILITY AND QUALITY	
A. Within 1 month of entry of final order: Defendant will submit to the Court a formal plan of its targeted outreach program. Defendant shall submit the plan in a MS Project GANTT or PERT chart format. The formal plan shall specify at least three unique final outcome measures, derived from current or newly created State databases, which are capable of demonstrating to the Court that "aggressive and effective" outreach has been and is being successfully achieved. The plan will specify the procedures which will be used, the specific dates for each phase of targeted age-specific	Ireys Report: Improve age-specific outreach: Conduct systematic assessment of the effectiveness of procedures MCOs are using to provide outreach, enhance screening rates and track children. Develop the capacity to track referrals and a standardized approach for following up and reporting on missed appointments. McKinsey: Part 2, Care Management Initiatives, C3. Page 32 "Undertake a set of efforts to promote *evidence-based* medicine" (150-240 million impact by FFY2008) Senate Bill 3392 Section 22(e) "Medical protocols using *evidence-based* medicine that are established

[1] Paul Newacheck, Burton Edelstein, Marci White, Larry Platt, Sara Rosenbaum

outreach, the evidence-based methods used to implement targeted outreach, and the specific steps which will be taken to identify, reach out to, and track at least 50 percent of those subpopulations of children at particular risk for underservice, such as children who have missed their last scheduled screen or dental visit, children whose parents, guardians or caregivers read at level one, adolescents, children in families in which the primary language spoken is other than English, children in rural areas, and children in out-of-home placements ¶¶39, 40, 51, 52) **B. Within 1 month of entry of final order:** Defendants will submit a comprehensive plan in a MS Project GANTT or PERT chart format. The formal plan will specify at least three unique final outcome measures, derived from current or newly created State databases, which can demonstrate to the Court that APSP and	pursuant to section 2 of this Act shall satisfy the standard of medical necessity." EVIDENCE-BASED MEDICINE (EBM), 2nd Edition, Churchill Livingstone, 2000 Appendix 2 glossary, page 246 "*Evidence-based* health care: Extends the application of the principles evidence-based medicine (see below) to all professions associated with health care, including purchasing and management" "*Evidence-based* medicine: the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patient. . . ." Specificity and Sensitivity: See EMB Glossary page 247-249 for EBM definitions and uses. Governor's Executive Order # 7 "AN ORDER ESTABLISHING THE GOVERNOR'S CHILDREN'S CABINET" March 18, 2003 (first two declarations) "WHEREAS, the children of Tennessee represent this

DSP rates specified in the consent decree for all TennCare children and for those in State custody are being successfully achieved. The plan shall also include the mechanisms by which 1) the health providers conducting the screenings track their referrals including referrals to dentists, and 2) the specificity and sensitivity of the screening process is measured to assure high quality screening. Defendant's submissions related to continued improvement in screening rates will outline the data to be submitted which will demonstrate success in achieving screening and provider participation benchmarks and the methods which will be used to ensure the ability of data submitted to show progress. (¶¶45-52) In additional [sic] to annual reports of the APSP and DSP, defendants will also report raw screening rates on a quarterly basis for all key outreach subpopulations described above as well as	state's *greatest asset*; and WHEREAS, one of state government's highest priorities is to *provide needed services* and opportunities to our state's children; and. . . ."

for all children and children in custody by age to be reviewed by Special Master in order to measure interim progress in reaching the APSP and DSP rates specified. (¶¶45-52)	
C. Within 3 months of entry of final order: Defendant will submit periodicity schedules (beginning at birth and continuing through age 21), which have been formally reviewed and approved by relevant health professions expert organizations in the state and which address all required elements of: (a) periodic screening for physical, mental, emotional, behavioral and developmental health conditions, (b) dental examinations; (c) vision examinations; and (d) hearing examinations. The schedules shall be accompanied by supporting materials, which shall clarify that no prior authorization is necessary for screens and that interperiodic screens are to be available as needed without prior authorization.	

Defendant will develop conforming contract amendments that incorporate the periodicity schedules with accompanying written TSOP instructions to all prime contractors, subprime contractors, and network providers in place by no later than 4 months following final entry of this order. Not later than 5 months following entry of this order, Defendant will conduct in-person training sessions with all contractors and subcontractors. (¶¶41, 42)	
D. Within 3 months of entry of final order: Defendant will submit to the Court comprehensive plan for ensuring network adequacy in a MS Project GANTT or PERT chart format. The plan will include the measurable steps which it will take (such as increasing reimbursement rates, modification of licensure standards, assistance with malpractice coverage costs, the extension of hospital staff privileges, or other	Attorney General Ross: May 17, 2004. "That documents (Ireys Report) is a plan." " . . . the TennCare Bureau is committed to achieving 80% APSP by the end of fiscal year 2007 . . . "

provider incentives) which are known to increase provider participation and screening rates, The formal plan will specify at least three unique outcome measures, derived from current or newly created State databases, that demonstrate to the Court that both primary care and specialist networks are adequate to 1) to maximize achievement of the APSP (70% by October 2005, 75% by October 2006 and 80% by October 2007) and the DSP (80% by October 2007), and 2) achieve a network size and scope which is sufficient to serve the expanded population of children utilizing health services as a result of improved outreach. Defendant's plan for network improvement shall specify the growth rates from the date the final order is entered which it anticipates through improved outreach, the level of primary, dental, and specialty medical and mental health networks needed at each level of growth, and the methods it will use to	Ireys Report: Develop a method for assessing adequacy of PCP networks that includes both availability or providers and their capacity to serve additional Medicaid children.

expand network capabilities as growth occurs. (¶¶43, 45-52)	
E. Within 5 months of entry of final order: Defendants will submit to the court standard screening instruments for periodic screens, vision care, dental care, mental health and hearing care developed, along with draft instructions for the use of each instrument. Such instructions shall ensure, among other matters, that network primary care providers are informed of their responsibility for referral and follow-up. Instruments with use instructions will be distributed to all prime contractors, sub-prime contractors, and relevant network providers, as well as to health department screening sites within 2 weeks of Court approval. The instrument must be capable of capturing and recording each required element of a periodic screen as well as other information which permits the tracking of children with suspected physical,	Ireys Report: Develop a strategic plan for increasing the use of the standard form among all types of EPSDT providers. Goal to continue progress in encouraging use of mental health screening tools, especially for high-risk groups of children and development of methods for tracking children who have failed a screen and who are referred for additional evaluation or treatment (p.16)

mental, emotional and behavioral, developmental, or dental health conditions. Specifically, the design of the screening instruments must ensure that required screening elements, diagnoses, and referrals can be readily tracked using Defendant's electronic management information system (MIS). The medical screening form must also be capable of showing that the required dental referral is included. As proof of tracking compliance, Defendants will submit to the Court the State MIS database generated by the form(s), which must be capable of being electronically linked to TC claims, DCS TnKids, DHS, DOH, DMHDD. Submission of databases will begin on the first day of the first full quarter following the date of Court approval of the screening instruments and will continue on a quarterly basis thereafter. (¶¶94-95)	
F. Within 6 months of entry of final order: Defendants shall submit	

for Court approval a draft plan for a continuing education program for providers who furnish EPSDT screening and referral or related services. the program shall consist of periodic oral and written communication methods and shall be aimed at prime contractors, subcontractors, all EPSDT relevant screening and dental network providers. The program will be designed to instruct all participating health care providers and MCOs and their sub-contractors regarding the importance of periodic and interperiodic screens, the role of the screening instrument, referrals to dentists and to specialists as needed for diagnostic and treatment services, and how network screening and dental providers can secure assistance from MCOs and other relevant prime and sub-prime contractors in carrying out their screening, referral and treatment responsibilities. (¶¶46, 47, 61)	

2. IMPROVING ACCESS TO MEDICALLY NECESSARY DIAGNOSIS AND TREATMENT FOR PHYSICAL, MEDICAL AND DENTAL NEEDS	
A. Within 6 months of entry of final order: Defendants will provide the Court with an analysis (using a valid methodology and statistically reliable data) that shall be based on dental claims administered by TennCare's ASO, Doral Dental. The analysis shall include (a) the percentage of dentists providing dental services to EPSDT enrollees as measured by numbers of visits, services, and amounts paid to each provider, (b) an analysis of service profiles of participating dentists to identify dentists who furnish less than comprehensive care; (c) an analysis of overall services provided to determine the ratio of preventive to restorative care by age, (d) geographic distribution and adequacy of the dental provider network as a function of numbers of enrolled children by service area, (e) the numeric and geographic availability of	Ireys Report: Establish an information system that tracks adequacy of providers, referrals, follow-up services, and dental adequacy.

dental specialists in the network, and (f) the level of dental service provision by newly enrolled dentists over their first year of participation. The analysis shall address the steps which will be taken, using evidence-based methods, for correcting deficiencies in dental supply, in terms of geographic region or type of service (i.e., routine, restorative (including orthodontic care) and emergency care). (¶¶41(l) and (m); 53; 59; 61; 63; 66, 70; 71)	
B. Within 2 months of entry of final order: Defendant shall submit a detailed comprehensive plan in a MS Project GANTT or PERT chart format. The formal plan will specify at least three unique final outcome measures, derived from current or new State databases, that demonstrate to the Court; for 1) that continuity of care for children with suspected or diagnosed emotional and behavioral health conditions requiring a range of outpatient and inpatient	Ireys Report: Continued efforts with appropriate state agencies to identify mental health professionals who can provide appropriate diagnostic and treatment services in underserved areas.

services will be ensured regardless of the child's status within the child welfare system or special education systems, for 2) how parental involvement in decision making will be maximized, for 3), how medically appropriate discharge planning will be effectuated, and for 4) how medically necessary case management services will be furnished. The formal plan will include assignment of responsibilities and resources required. (¶¶61, 63-71) **Within 3 months following approval of the plan:** Defendants shall amend all TennCare contracts to conform the agreements to the specifications of the approved plan. Amendments shall be submitted to the Court for approval.	
C. Within two months of final entry or order: Defendants shall submit for Court approval a comprehensive plan in a MS Project GANTT or PERT chart format. The	Ireys Report: "Continued work to assess the adequacy of the network of pediatric subspecialists who can provide diagnostic evaluations and treatment to children with or at risk of

formal plan will specify at least three unique final outcome measures, derived from current or new State databases, that demonstrate to the Court that by July 2005 specialty care for children enrolled in TennCare will be available at a level comparable to that available to Tennessee children with state employee or private health insurance. Comparability is to be established based on providing TennCare enrolled children specialty network capacity equal to that of plans serving privately insured children, or using an alternate method approved by the Court. The plan will include action steps, assignment of responsibilities, and resources. The plan must also provide a description of measurable actions to increase availability of specialists (e.g., financial incentives, improvements in claims payment and provider support, requiring TennCare participation.). (¶61 and footnote 10)	chronic illnesses. Improved tracking of children w/ chronic medical illnesses and disabilities to ensure that they are receiving all medically necessary services. Development of sentinel indicators for assessing quality of care over time, such as the number of children w/ EPSDT screens who receive specialty care or who are hospitalized compared with children who are not screened."

3. MEDICAL NECESSITY	
A. IMMEDIATE RELIEF consisting of approval of all diagnosis and treatment services which are recommended by treating medical, dental and mental health professionals, including medically necessary case management, pending judicial review and acceptance of a revised definition of medical necessity and implementation of a medical necessity review process by Defendants throughout the TennCare system which appropriately reflects the definition and elements of medical necessity: Until Defendant has fulfilled the further relief obligations outlined in this [section], Defendant shall treat as approved, and shall ensure prompt coverage and payment for, any diagnostic or treatment benefit (including pharmaceutical benefits, dental benefits, treatment for emotional and behavioral disorders	Ireys Report: Improved tracking of children with chronic medical illnesses and disabilities to ensure that they are receiving all medically necessary services Ireys Report: Conduct focused external quality review on selected program components, such as referral procedures & outcomes, data reporting for MCO's, or the use of developmental and mental health screening tools

and developmental delays, as well as medically necessary case management) for which coverage is mandated under the federal EPSDT statute, regardless of coverage limits which may be permissible in the case of beneficiaries not entitled to EPSDT benefits. Coverage and payment shall be based solely on the clinical recommendations of treating professionals and without regard to any medical necessity review process applicable under TennCare to other enrolled populations. Defendant shall immediately notify contractors, provider networks, and all agencies and programs involved in the care and support of Medicaid-enrolled children regarding the availability of coverage and payment for medically recommended diagnostic and treatment services without prior approval. (¶¶55-61, 101, 102) **B. Within 10 days of entry of final order:** Defendant shall submit for	

Court review a draft definition of medical necessity which incorporates all of the elements of the consent decree. (¶¶55-61)	
C. Within 10 days of Court approval of revised definition of medical necessity: Defendant shall disseminate the revised definition to all MCOs, BHOs, PBMs, Dental ASOs, their sub-prime contractors, all network providers, all EPSDT "Working" committees established by defendants and their members, and Health Department providers. The definition shall be accompanied with detailed guidelines, also to be reviewed by the Court prior to their dissemination. The guidelines, which shall be memorialized as a formal TSOP, shall instruct providers and contractors regarding the elements of the new definition and the manner in which the definition shall be applied to requests for prior or concurrent approval of diagnosis	

or treatment for physical, dental, or mental conditions, including the relevance of treating physician opinion, clinical observation and experience, and expert consensus in determining whether proposed treatment can be expected to prevent or ameliorate the effects of a physical, mental, emotional and behavioral, developmental, or dental condition. The guidelines also shall clarify that the new definition preempts all other definitions in statute, contract or rule in the case of TennCare-enrolled children under age 21. Defendant shall ensure that all contractor-furnished instructions regarding medical necessity and utilization review in the case of children under 21 are consistent with these guidelines. (¶¶55-61)	
D. Within 10 days of Court approval of revised definition: Defendant will send to all educational agencies, early intervention	

programs, child welfare agencies, and other health programs serving TennCare children notification of new standard. The notice shall provide a comprehensive explanation of the standard and how the standard will be applied to any request for prior or concurrent approval of diagnostic and treatment services, as well as the primary evidentiary role played in the review process by the individual child's case and the evidence submitted by treating clinicians. (¶¶55-61; 78-84) **E. Within 10 days of Court approval of the revised definition:** Defendant shall issue utilization review procedures for use by MCOs, BHOs, Dental plans, PBMs, and reviewers handling appeals of plan denials. The procedures, which shall be reviewed and approved by the Court prior to dissemination, shall address the utilization review process in cases in which prior or concurrent authorization	

is required. The procedures shall provide a comprehensive explanation of the decision-making process which adheres to the Court approved standard of medical necessity. The utilization review procedures shall specify: 1) the competency of the reviewer, 2) the relevant evidence to be considered and weighed, 3) the permissible weight which can be given to cost, prevention, and amelioration considerations, 4) the level of evidence the reviewer must produce before overruling a clinical recommendation by a treating provider (burden of proof), and 5) a requirement that all denials be simultaneously forwarded to the TennCare Bureau for review. (¶¶55-61)	
F. Within 1 month of Court approval of the revised definition: Defendant shall modify all managed care contracts which are in effect (including sub-prime contracts and provider agreements)	

to include the Court approved definition of medical necessity. All contract amendments will be submitted to the Court for approval. (¶¶55-61)	
G. Defendants to make all denials and supporting documentation available for Court inspection. Defendant shall submit to the Court an accurate, complete, and formatted database containing detailed, child-specific information regarding any denial of any requested benefit or treatment which is made by any TennCare medical, pharmaceutical, dental, mental health, or other contractor. The data base shall cover all children under age 21 enrolled in TennCare. The data base for each denial shall contain patient specific information regarding all of the medical information relevant to the patient's case, the specific recommendations of the treating clinician, and the specific bases for the denial. The data base shall be made available to the Court on	

the first day of the first quarter following the date on which the Court permits coverage determinations to commence and quarterly thereafter. (¶¶55-61, 99, 102) **H. Within 1 month of Court approval of revised definition:** Defendant shall have in place a revised EQRO contract, whose purpose is to review Contractor adherence to the revised medical necessity definition and review process. * The draft contract shall be submitted to the Court for review. (¶ 101, 102)	
4. ENSURING ACCESS TO MEDICALLY NECESSARY CASE MANAGEMENT AND OTHER PATIENT SUPPORT SERVICES	
A. Within 2 months of entry of final decree: Defendant shall submit to the Court a comprehensive plan for provision of case management and patient support services in a MS Project GANTT or PERT chart format. The plan will specify at least three unique final outcome measures, derived from current or new State	Improve availability of medical case management

databases, that demonstrate to the Court that non-emergency transportation services for screening services, as well as medically necessary diagnostic and treatment services are being furnished to children in both urban and rural areas. The plan shall address transportation services for children residing either in their homes or in an out-of-home placement. (¶¶66-70)	
B. within 2 months of entry of final decree: Defendant shall submit to the Court a comprehensive plan for medically necessary case management in a MS Project GANTT or PERT chart format. The formal plan will specify at least three unique final outcome measures, derived from current or new State databases, that demonstrate to the Court that medically necessary case management is being provided to all children and specifically for each of the following groups of children: (a) children with special health care needs,	*Improve availability of medical case management

as defined under the TennCare Program but who at a minimum include any child included under the consent decree who has an ongoing physical, emotional or behavioral, developmental, or dental health need; (b) children receiving child welfare services; (c) children receiving special education or early intervention services; (d) children receiving behavioral health services or services for dual diagnoses. The plan shall detail (a) the competencies and skills required of case managers, (b) the methods proposed for recruiting an adequate supply of case managers and the case manager/patient ratios used to measure adequacy; (c) the compensation arrangements defendant proposes to use with contractors and through interagency agreements with other state and local agencies to ensure appropriate financing of case management services, and (d) the methodologies and data the Defendant will use to measure the appropriateness, timeliness and	

adequacy of case management services. (¶¶66-70; 61; 94)	
5. DOCUMENTING PERFORMANCE	
A. Within 3 months of entry of final order: Defendants shall submit to the Court a comprehensive plan for an operational health information system in a MS Project GANTT or PERT chart format for documenting performance. The formal plan must demonstrate to the Court that the MIS system can rapidly and accurately produce consent decree outcome measures requested by the Special Master or Special Master Experts. The plan will include the assignment of responsibility and resources required to achieve by March 2005 an operational health information system with the following capabilities in the case of children: The ability to track the receipt of medical, behavioral, and developmental screenings and dental examinations, diagnosis, treatment,	Ireys Report "Continued progress will be difficult, in part because no single person has sole responsibility for directing the program. The program requires a director and staff with sufficient time, authority and experience to take advantage of work already completed, build on current interest from all levels of the state government, develop a strategic plan, and manage the diverse facets of the EPSDT program." Ireys Report: "Central to any effective program is the capacity to gather information efficiently and use it to (1) help identify and address current operational problems in a timely manner and (2) develop strategic plans that position the program to respond effectively to changing population needs and state resources. Ireys Report: "Under the auspices of the Governor's

and case management services by individual children on a continuous basis from initial TennCare enrollment through the most recent disenrollment, across contractors, sub-contractors, and agencies, and regardless of a child's living arrangement (i.e., in home or in an out-of-home placement) The ability to analyze and report on the receipt of TennCare financed screening, diagnostic, and treatment services with respect to any covered medical, dental, or behavioral health care service (including medically necessary case management). Reporting capabilities shall be on both a population-wide basis and with respect to the following sub-populations: children in DCS custody; children with special health care needs; children receiving special education or early intervention services; and children receiving behavioral health services. For	office, develop a strategic plan for meeting program goals," Ireys Report: "One of the most important challenges facing state agencies responsible for the EPSDT program involves specifying program goals that are feasible and measurable." Ireys Report: Recommendations regarding development of overall framework and suggested goals and measures.

screening, diagnostic and all covered treatment services, Defendants shall develop proposed benchmarks of adequacy against which the amount, timeliness and sufficiency of care will be measured. The ability to monitor and report on the sufficiency of provider networks in the areas of primary medical care, all recognized pediatric medical sub-specialties, primary and specialized dental providers, allied health care professionals, and behavioral health providers. The ability to undertake special quality of care studies comparing the quality of care provided for selected acute and chronic physical, mental, developmental, and dental health conditions for specific sub-populations of children across both plans and provide networks within plans. (¶¶94-102)	

B. Within 3 month [sic] of approval of Defendant's health information systems plan: Defendant shall amend all contracts to specify contractor obligations under defendants' information system with respect to the collection, storage, management, reliability, validity, and transmission of the data necessary to maintain defendant's information system. The draft amendments shall be submitted to the Court for review and approval. (¶¶ 94-102)	
C. Within 6 months of the final order the Defendant shall submit IAP 6 with the following amendments: 1) For each item the State will declare whether or not it believes it is currently in complete compliance with the respective item. If not, the State will identify the estimated percent completion for the item and submit a formal plan to achieve full compliance with the mandate. 2) for each item declared by the	

State to be in current compliance, the State will submit its evidence-based proof and the records, reports, or databases upon which that proof relies. 3) All the items in this Order will be incorporated into the IAP 6 under the appropriate items and query headings.	

[LOGO] THE GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER WASHINGTON, D.C.

SCHOOL OF PUBLIC HEALTH & HEALTH SERVICES

DEPARTMENT OF HEALTH POLICY

Memorandum

To: Dr. Richard Carter, Special Master, *John B.*

Fr: Sara Rosenbaum, Hirsh Professor and Chair

Re: Recommendations regarding order of further relief

July 16, 2004

Introduction

This memorandum sets forth my recommendations regarding a possible order of further relief in the *John B.* case. I focus my recommendations on issues arising from the standard of medical necessity which the state uses to make coverage determinations for children enrolled in TennCare. The standard of medical necessity and its application to individual cases was a significant focus of the Consent Decree. I begin this memo with a background which recaps my fact-finding for the Court. I then set out a series of suggestions for incorporation into an order of further relief.

Background

A. The Consent Decree

The Consent Decree (CD) contains a series of provisions related to medical necessity which, as the CD notes, are based on provisions of federal law, 42. U.S.C. §§1396d(a)(4)(B) and (r), which also are reflected in guidelines published by the

Centers for Medicare and Medicaid Services (formerly HCFA).[1] The CD provisions, which are reproduced below in pertinent part, address the medical necessity standard which governs EPSDT:

> **(b) Medical necessity**
>
> 55. The Defendants shall review MCO practices with regard to making decisions about medical necessity and identify any practices that are inconsistent with the federal laws cited herein. The defendants shall issue clarifications and ensure compliance with such federal law, regarding medically necessary treatment, including but not limited to the following clarifications:
>
> (a) That prior authorization and medical determinations shall be made on a case-by-case basis for each services sought for a class member
>
> (b) That services are provided if necessary "to correct or ameliorate defects and physical and mental illnesses and conditions" * * *
>
> (c) That the definition of medical necessity shall be applied so that services are covered if they correct, compensate for, improve, or prevent a condition from worsening, even if the condition cannot be prevented or cured. * * *
>
> (d) That medically necessary services shall be provided, whether or not the condition existed prior to any screening, and whether or not the

[1] State Medicaid Manual §5010 et. seq., http://www.cms.hhs.gov/manuals/pub45/pub 45.asp (accessed July 17, 2004). The most important aspect of these guidelines in a medical necessity context is the following excerpt: "Health practice standards based on professional judgements [sic] are an essential factor." SMM 5030.

screener is under the contract with the particular managed care entity.

(e) That defendants and their contractors and subcontractors are in compliance with HCFA Office of Managed Care Operational Policy. Letter No. 96.045 (Dec. 3, 1996), and do not have financial or contractual arrangements which undermine class members' access to covered services.

56. The defendants will ensure that the MCOs and DCS use only the definition of "medically necessary" in the TennCare MCO contracts when making medical necessity decisions. Nothing in this section shall be interpreted to limit an MCO's ability to use or establish mechanisms to apply the TennCare contractual medical necessity definitions, or to direct patients to medically appropriate more cost effective alternatives, provided these services would adequately address the patient's medical needs.

57. The defendants and their contractors shall not impose the absolute amount limitations that were previously listed in the benefit plan, nor shall they impose duration and scope limitations or monetary caps on EPSDT services. Rather, such services shall be required to be based on each child's individual needs. This is not intended to limit the ability of a managed care organization to place "tentative" limits on a service (e/g., prior authorization * * *). However, any such limits must be consistent with the "preventive thrust" of EPSDT.

Utilization controls cannot unreasonably delay the initial or continued receipt of services, nor can they cause recipients to go without needed care. There must be an expeditious process in

place to ensure that children receive without interruption any medically necessary services which exceed tentative limits. Any denial of a timely request from the provider who originally prescribed an ongoing service for continuation of the service beyond tentative limits shall be attended by notice to the beneficiary prior to reduction or termination of the services; if the denial is appealed in a timely fashion, the services shall be continued pending appeal, without regard to the managed care contractor's tentative limits. * * * A request from a provider for continuation of a service shall be considered timely if it is made prior to termination of the treatment interval previously approved by the MCO. The state or its contractor will review the MCO prior approval/utilization review process on an annual basis to assure that tentative limits approved by the MCOs are appropriate.

58. The defendants and their contractors shall require that utilization review and prior authorizations decisions be made only by qualified personnel with education, training, or experience in child or adolescent health. Within 120 days of the entry of this order, the defendants shall establish standards and procedures for monitoring their contractors utilization review and prior authorization activities to ensure compliance with this requirement.

(b) Prior Authorization

59. The MCOs shall provide all medically necessary covered services regardless of whether or not the need for such service was identified by a provider whose services had received prior authorization from the MCO or by an in-network provider.

John B Consent Decree

Paragraphs 60-77 amplify on these medical necessity provisions: the duty to ensure medically necessary care for certain groups of children (e.g., children in DCS custody, ¶ 60); the duty to educate provider networks and bind them to the CD standards of medical necessity review and timely services (¶ 61) or certain types of health conditions (e.g., behavioral health problems); the duty to provide primary care providers with specialty lists (¶ 62); the duty to adhere to these standards in a treatment-specific context (¶¶ 63-65); the duty to furnish medically necessary case management (¶¶ 66-70); the duty to furnish medically necessary behavioral health services (¶ 70-73); the duty to ensure medically necessary covered care when furnished in educational settings in the case of Medicaid-enrolled children also receiving IDEA services (¶ 81); and the duty to coordinate and deliver medically necessary care for children in DCS custody (¶ 84).

In sum, the CD appears to set out the elements of the medical necessity (both standards and procedures) concept that serves as a "platform" for many portions of the decree. The CD appears to requires [sic] the Defendants to active [sic] translate this concept of medical necessity throughout the TennCare system through a series of actions:

- Incorporation into contracts and written contractor guidance of a medical necessity definition that adheres to the terms of the CD.
- Developing – and overseeing contractor adherence to – a utilization management process which adheres to and furthers the standard in terms of both review procedures

and coverage guidelines (i.e., tentative coverage rules)

- Ensuring an external appeals process which adheres to CD standrds [sic]
- Ensuring that contractors actively incorporate the medical necessity provision, along with covered services, to specific subgroups of children enrolled in TennCare plans, such as children in DCS custody, institutions, and special education and early intervention programs

B. State Response

1. Implementation of the Consent Decree

As I noted in my April 12 memo, in my interviews with state officials and inspection of documents, I could find no evidence that defendants have adhered to the medical necessity provisions of the CD. Indeed, I was provided with a draft contract during my January 2004, visit which specifically reiterates the existing contractual definition which has no bearing on the CD. With respect to children under 21, the January draft reiterates the ongoing contract standard (which is not the standard of the CD) and adds the following clause:

> *e. When applied to TennCare Medicaid enrollees under 21 years of age, services shall be provided in accordance with EPSDT requirements including federal regulations as described in 42 CFR Part 441, Subpart B, and the Omnibus Budget Reconciliation Act of 1989.* [emphasis added]

As I noted in my earlier memo, the federal rules referenced in this excerpt from the draft contract contain no

definition of medical necessity. These federal rules predate the 1989 EPSDT amendments which form much of the basis of the CD.

Defendants could not provide me with interpretive guidance for contractors and their networks, standards for utilization management procedures, standards for the management of children in educational or child welfare settings.

Defendants provided a document known as a "TSOP" (TennCare Standard Operating Procedure) pertaining to EPSDT. The TSOP specifies that covered services must be furnished to children if medically necessary, without regard to otherwise applicable limits. The TSOP also indicates that medical necessity decisions should be made on a case by case basis. However, the TSOP contains no definition of medical necessity, nor does it outline utilization management procedures outlined, procedures outlined for ensuring access to medically necessary treatment for children screened by non-network providers, procedures to ensure provision of services at the proper standard for children in special education or child welfare custody, or procedures for addressing specific conditions identified in the CD such as behavioral health.

State officials did not provide standards governing contractor information regarding coverage to their provider networks.

State officials did not provide information on a contractor review system to gauge compliance with the medical necessity provisions of the CD.

2. TennCare Medical necessity statute

In the spring of 2004, the legislature enacted a series of legislative reforms to TennCare proposed by the Governor. The legislation contains a provision setting for a statutory definition of medical necessity which governs the TennCare program.

The definition, which as I noted in my earlier memorandum represents a departure from all previous medical necessity standards which I have studied for the federal government, essentially classifies as experimental (and thus excluded) all medical care covered by TennCare unless a patient can demonstrate that the service is covered and that the item or service can "satisfy each of the following criteria:"

> (1) It must be required in order to diagnose or treat an enrollee's medical condition. The convenience of an enrollee, the enrollee's family, or a provider, shall not be a factor or justification in determining that a medical item or service is medically necessary;
>
> (2) It must be safe and effective. To qualify as safe and effective, the type and level of medical item or service must be consistent with the symptoms or diagnosis and treatment of the particular medical condition, and the reasonably anticipated medical benefits of the item or service must outweigh the reasonably anticipated medical risks based on the enrollee's condition and scientifically supported evidence;
>
> (3) It must be the least costly alternative course of diagnosis or treatment that is adequate for the medical condition of the enrollee. When applied to medical items or services delivered in an

inpatient setting, it further means that the medical item or service cannot be safely provided for the same or lesser cost to the person in an outpatient setting. Where there are less costly alternative courses of diagnosis or treatment, including less costly alternative settings, that are adequate for the medical condition of the enrollee, *more costly alternative courses of diagnosis or treatment are not medically necessary.* An alternative course of diagnosis or treatment may include observation, lifestyle or behavioral changes or, where appropriate, no treatment at all; and

(4) It must not be experimental or investigational. A medical item or service is experimental or investigational if there is inadequate empirically-based objective clinical scientific evidence of its safety and effectiveness for the particular use in question. This standard is not satisfied by a provider's subjective clinical judgment on the safety and effectiveness of a medical item or service or by a reasonable medical or clinical hypothesis based on an extrapolation from use in another setting or from use in diagnosing or treating another condition.

(A) Use of a drug or biological product that has not been approved under a new drug application for marketing by the United States Food and Drug Administration (FDA) is deemed experimental.

(B) Use of a drug or biological product that has been approved for marketing by the FDA but is proposed to be used for other than the FDA-approved purpose will not be deemed medically necessary unless the use can be shown to be widespread, to be generally accepted by the professional medical community as an effective and

proven treatment in the setting and for the condition for which it is used, and to satisfy the requirements of (b)(1)-(3).

(c) It is the responsibility of the bureau of TennCare ultimately to determine what medical items and services are medically necessary for the TennCare program. The fact that a provider has prescribed, recommended or approved a medical item or service does not, in itself, make such item or service medically necessary.

(d) The medical necessity standard set forth in this section shall govern the delivery of all services and items to all enrollees or classes of beneficiaries in the TennCare program. The bureau of TennCare is authorized to make limited special provisions for particular items or services, such as long-term care, or such as may be required for compliance with federal law.

HB 3513, §22 (emphasis added)

Table 1 below illustrates the differences between the concept of medical necessity in the *John B.* Consent Decree and the new TennCare legislation.

No. 06-901

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In The
Supreme Court of the United States

DAVID GOETZ, COMMISSIONER,
TENNESSEE DEPARTMENT OF FINANCE
AND ADMINISTRATION, ET AL.

Petitioners,

v.

JOHN B., BY HIS NEXT FRIEND, L.A., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should exercise its extraordinary power in certiorari to review the Sixth Circuit's interlocutory decree denying Petitioners' Petition for Writ of Mandamus where the Sixth Circuit's decision does not conflict with any other circuits and is plainly correct.

2. Whether this Court should exercise its extraordinary power in a case which turns on specific factual findings of the lower courts and where Petitioners' arguments rest on unsupported innuendo.

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FED. R. CIV. P. 53 13

THE RESPONDENTS' BRIEF IN OPPOSITION

SUPPLEMENTAL STATEMENT

This nine-year-long litigation involves Petitioners' compliance with federal law in administering its Medicaid program, "TennCare." In October 2004, District Judge John Nixon entered an order finding that the State did not comply with a 1998 consent decree and presented a remedial plan prepared by the special master ("October 2004 Order"). Petitioners challenged the October 2004 Order as "tainted fruits" of allegedly improper *ex parte* communication between the judge and the special master. In order to eliminate the distraction of this baseless charge from a case involving urgent need for medical care of Tennessee children and to avoid a protracted discovery battle waged by Petitioners, Judge Nixon vacated the October 2004 Order and *sua sponte* recused himself in February 2006. The case was immediately reassigned to a new judge.

To keep the case on track, the new judge relieved the special master of his duties and appointed a new panel of monitors to act as a special master. To preserve the knowledge and expertise accumulated by the former special master in this complicated litigation, the new judge retained the former special master as a technical advisor for the new monitors and decided to consider the proposed remedial plan prepared by the former special master as one of the potential remedial plans. The new judge ordered full discovery related to the proposed remedial plan and the underlying report and a full hearing on Petitioners' compliance with the Consent Decree.

Petitioners sought disqualification of the former special master as a technical advisor, discovery concerning the allegedly improper *ex parte* communication, and

suppression of the proposed remedial plan and the underlying report. The new judge denied Petitioners' requests. Petitioners then petitioned for a writ of mandamus from the Sixth Circuit. Upon denial of the petition by the Sixth Circuit, Petitioners now seek to invoke this Court's extraordinary certiorari power to review the Sixth Circuit's refusal to issue the writ of mandamus.

A. Procedural History and Prior Judicial Findings of Tennessee's Failure to Comply with the Consent Decree.

In accepting federal Medicaid funding over many years, Tennessee promised to comply with federal laws. Those laws include an obligation to meet early and periodic screening, diagnosis and treatment ("EPSDT") standards for children enrolled in its Medicaid program, called "TennCare." In 1998, TennCare entered into a consent decree with Respondents that incorporated those federal standards and gave the State an extended period to fully implement them ("Consent Decree"). (Pet. App. 25a.)

In 2001, following a three week hearing, Judge Nixon found that the State had "failed to ensure compliance with all aspects of the EPSDT mandate . . . " (*Id.* at 18a, 25a.) Despite the finding, the court did not find contempt or impose sanctions against the State. The court appointed a special master to mediate the development of a remedial plan in April 2002. The April 2002 appointment order authorized *ex parte* communications between the special master and the parties and/or their counsel. (*Id.* at 77a-79a.) The order did not address the issue of *ex parte* communication between the special master and the Court. (*Id.* at 78a.)

In August 2002, the district court concluded that the special master's mediation efforts had failed to produce a consensus plan for achieving compliance. (*Id.* at 18a.) He revised the special master's role to facilitate and assess the State's compliance. (*Id.*) He authorized the special master to hire experts to assist in that task. (*Id.* at 72a.) The district court informed the parties that it would periodically measure the State's adherence to the terms of EPSDT law and the Consent Decree, and that, in so doing, it would be "guided by the Special Master's input." (*Id.* at 18a.)

The court received such input in ongoing *ex parte* communications between the special master and the district court. The communications were a matter of public record; the State was aware of them. (*Id.* at 99a.) The State did not object to the special master's communications with the court prior to the October 2004 Order.

B. Judge Nixon's October 2004 Order and His *Sua Sponte* Recusal.

On October 22, 2004, Judge Nixon found the State in violation of the Consent Decree. (*Id.* at 29a.) Judge Nixon attached a proposed remedial plan prepared by the special master. (*Id.* at 31a.) He requested that the parties review the plan and file any objections with the court. He allowed the parties to depose the special master and his experts. (*Id.* at 32a.) The court indicated that he would make a final determination regarding the remedial plan once he reviewed the comments and suggestions filed by the parties at the close of the post deposition comment period. (*Id.*)

The process envisioned by Judge Nixon never occurred. The State immediately attacked the October 2004

Order and the proposed remedial plan, based on allegedly improper *ex parte* communications between the court and the special master. (*Id.* at 19a.) The State sought discovery concerning such *ex parte* communications. However, due to a state fiscal crisis, the court held the case in abeyance to facilitate negotiations and while it determined issues raised in a companion TennCare case. (*Id.* at 19a, 22a.)

When the court reactivated the case in November 2005, the State renewed its objections to the October 2004 Order and the proposed remedial plan. Both the Petitioners and the Respondents proposed that the court vacate the October 2004 order. (*Id.* at 19a.) As a result, Judge Nixon vacated the October 2004 order. (*Id.*)

Because of the State's insistence on further discovery into the allegedly improper *ex parte* communication, Judge Nixon *sua sponte* recused himself in February 2006 to avoid a protracted dispute over collateral issues, stating that "the healthcare of Tennessee's children must come first." (*Id.* at 20a-21a.)

C. The Replacement of the Special Master With Five New Monitors.

Judge William J. Haynes, Jr. took over the case in February 2006. He undertook several steps to keep the case on track, to "avoid collateral issues from interfering with the resolution of the Defendants' compliance" and "to meet the urgent medical care needs of the children." (*Id.* at 9a.)

First, Judge Haynes relieved the special master of his duties as a special master and reappointed him "as a technical advisor for this non-traditional litigation under

the inherent authority of this Court." (*Id.* at 12a.) Judge Haynes subsequently explained that the retention of the technical advisor was necessary because he "did not want to lose the resources that have been expended or the acquired knowledge that they have accumulated in their work." (*Id.* at 100a.) Judge Haynes specifically instructed the technical advisor not "to report to or communicate with the Court." (*Id.* at 4a.)

Judge Haynes appointed a new panel of monitors to replace the former special master. (*Id.* at 6a.) Judge Haynes ordered the new monitors to "serve in a quasi-judicial capacity" and to "have the principal responsibilities of monitoring the Defendants' compliance with the Consent Decree in designated areas." (*Id.* at 6a-8a.) The former special master and his experts would remain available to the parties as expert witnesses, and the monitors could use them as technical advisers. (*Id.* at 131a.)

D. Judge Haynes' Order For An Evidentiary Hearing and Full Discovery To Prepare for the Hearing.

Judge Haynes also ordered an evidentiary hearing on June 19, 2006. (*Id.* at 14a.) He ordered the parties "to commence discovery immediately on the status of the Defendants' compliance of the Consent Decree and the Courts' Orders as well as the status of any plan or process of the Defendants to do so." (*Id.* at 12a.) Judge Haynes indicated that he would include the proposed remedial plan prepared by the former special master among the plans to be considered. (*Id.* at 134a.)

Judge Haynes directed the former special master to disclose to the parties all non-privileged documents on which his report had been based. (*Id.* at 13a.) He granted the parties leave to take discovery of the former special master and his experts regarding the bases of their findings or recommendations in the report and the proposed remedial plan. (*Id.* at 95a-96a, 106a, 108a-109a, 124a, 128a, 134a-135a.) He imposed only two limitations on the discovery: no inquiry concerning any communication between the former special master and Judge Nixon or any communication between any employee or agent of either party and the former special master (as agreed upon by the parties). (*Id.* at 13a-14a, 96a, 106a, 117a, 129a, 134a.)

E. The State's Petition for Writ of Mandamus to the Sixth Circuit.

Subsequent to Judge Haynes's orders in early 2006, the State renewed its demand to take discovery of the *ex parte* communications between the former special master and Judge Nixon. The State also sought disqualification of the former special master as a technical advisor as well as suppression of the October 2004 Order and the proposed remedial plan. Upon Judge Haynes' rejection of those requests, the State petitioned for a writ of mandamus in the Sixth Circuit.

The Sixth Circuit panel unanimously denied the petition on its face in an unpublished decision. (*Id.* at 2a-3a.) Upon the state's petition for rehearing en banc, not a single member of the court voted to disturb the panel's ruling. (*Id.* at 81a.) The Court of Appeals found that the "petitioners have not demonstrated a clear and indisputable

right to the disqualification of the technical advisors because they have not shown that they were or are acting in a quasi-judicial capacity." (*Id.* at 3a.) The Sixth Circuit also found that "the recusal of the district judge with whom the alleged *ex parte* communications occurred convinces us that rulings in this case will not be based on information that may have been communicated to the prior judge that has not been placed on the record and which the parties have not had the opportunity to challenge." (*Id.*) The Sixth Circuit further concluded that since the previously undisclosed report was now part of the record, the parties could litigate the issues raised in the report. (*Id.*)

REASONS FOR DENYING THE WRIT

A petition for a writ of certiorari to review an interlocutory order should be granted only upon a showing that the case is of such "imperative public importance as to justify deviation from normal appellate procedure and to require immediate determination in the Supreme Court." U.S. Sup. Ct. Rule 11. The Court has repeatedly cautioned that such a petition is not granted unless it is necessary to prevent extraordinary inconvenience and embarrassment. *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1950); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (writ of certiorari should not be granted except "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal"); *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893) (commenting that a writ should not issue "unless it is necessary to prevent extraordinary inconvenience and

embarrassment in the conduct of the cause"). This Court's certiorari power is "sparingly exercised." *Forsyth v. Hammond*, 166 U.S. 506, 515 (1897). "Such a petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. Rule 10.

No extraordinary circumstances exist in this case which justify granting the petition. The Sixth Circuit's decision does not conflict with rulings of other circuits. Petitioners have engineered the alleged conflict by mischaracterizing the Sixth Circuit's ruling and by engaging in wholly unsupported assumptions.

The Sixth Circuit's decision is also plainly correct. Invoking this Court's supervisory power at this stage is improper because Petitioners are merely inviting the Court to second guess the lower courts' factual findings and to intervene prematurely with the lower courts' exercise of their discretionary duties.

I. The Sixth Circuit's Denial of the Extraordinary Remedy of Writ of Mandamus Does Not Conflict with Other Circuits.

Petitioners' sole rationale for invoking this Court's extraordinary jurisdiction is the alleged existence of a "square conflict" between the Sixth Circuit's unpublished interlocutory order and the D.C. Circuit's decision in *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006). There is no such conflict. Petitioners' conflict argument rests on a mischaracterization of the Sixth Circuit's decision below and unwarranted assumptions. (Pet. at p. 10.)

Petitioners characterize the Sixth Circuit's decision as adopting a rule "that a judicially appointed officer performing [quasi judicial] functions need not be impartial." (*Id.* at p. 12.) Petitioners assert that an inter-Circuit conflict exists because the D.C. Circuit and all other jurisdictions held that special masters are subject to disqualification because they played a role that was "functionally indistinguishable from . . . a trial judge." (*Id.* at p. 11.) (quoting *Kempthorne*, 449 F.3d at 1269.)

Petitioners grossly mischaracterize the Sixth Circuit holding. The Sixth Circuit actually held that Petitioners failed to demonstrate "a clear and indisputable right to the disqualification of the technical advisors because they have not shown that they were or are acting in a quasi-judicial capacity." (Pet. App. 3a.) Indeed, the Sixth Circuit explicitly acknowledged the general rule that the "prohibition against obtaining personal knowledge of disputed facts set forth in [28 U.S.C.] §455 has been applied to a special master or a court appointed monitor serving in a quasi-judicial capacity," and expressed no reservation about the rule. (*Id.*) In other words, the Sixth Circuit's holding rests on Petitioners' failure to satisfy the underlying factual prerequisite that the technical advisors be "acting in a quasi judicial capacity."

Petitioners' conflict argument rests on their erroneous and unsupported assumption that the former special master in his current new role as a technical advisor is now acting as "in a quasi judicial capacity" in the instant case. They ignore the plain fact that the former special master was relieved of his duties as a special master and a new panel has been appointed to replace him. (*Id.* at 12a.) The relevant inquiry is whether the former special master should be disqualified as a technical advisor going forward.

Petitioners have not offered and cannot offer, any legal authority supporting their position that the technical advisor is now acting "in a quasi judicial" capacity in this case and hence is subject to disqualification due to any alleged bias.

The Sixth Circuit's refusal to review the district court's decision also does not otherwise create an impermissible conflict with the other circuits. Although not clear from their arguments, Petitioners seem to be suggesting that the former special master's work product should be suppressed because of his prior role as a special master due to the prior alleged improper *ex parte* communication with Judge Nixon. Even though the former special master was acting "in a quasi judicial capacity" when he prepared the proposed remedial plan and the report, Petitioners have cited no law which mandates suppression of the former special master's work product under the circumstances found in this case. In refusing to second guess the district court's refusal to suppress the work product, the Sixth Circuit concluded that the recusal of Judge Nixon and the opportunity to litigate all of the issues rendered it unnecessary for the Sixth Circuit to intervene. The Sixth Circuit's decision does not conflict with the *Kempthorne* decision. As explained below, the Sixth Circuit's conclusion is amply supported by the record and plainly correct.

To support their conflict argument, Petitioners cite a line of cases in which special masters performing quasi judicial functions are subject to disqualification. (Pet. at pp. 12-13.) Petitioners' reliance on those cases is misplaced. The underlying factual premise in those decisions – that the technical advisor exercise "quasi judicial" powers – does not exist in this case. Petitioners have not offered, and cannot offer, any support for their assumption

that the technical advisor and his experts in this case are treated in the same way as special masters acting in a quasi judicial capacity.

The *Kempthorne* decision, relied on principally by Petitioners, is entirely distinguishable on the facts. In the *Kempthorne* case, the D.C. Circuit court suppressed the reports prepared by the special master because the special master engaged a senior officer of an interested party to assist him. The special master's reports relied upon the facts gathered by the senior officer. Under those circumstances, the D.C. Circuit found that the suppression of the reports was necessary. *Kempthorne*, 449 F.3d at 1271-1272.

Unlike the *Kempthorne* case, the alleged improper conduct in this case was the *ex parte* communication between Judge Nixon and the former special master, which allegedly deprived Petitioners of an opportunity to be heard. Even assuming, *arguendo*, that the *ex parte* communication was somehow improper (Petitioners have provided no authority to support their allegations of improper conduct), Judge Nixon had already vacated the allegedly "tainted" order and recused himself. (Pet. App. at 19a, 21a.) Furthermore, Judge Haynes relieved the special master of his duties as a special master. He ordered a full disclosure of information related to the former special master's report and the proposed plan and full hearing on the issues of the state's non compliance and any remedial plan. (*Id.* at 13a-14a.) Petitioners will have an opportunity to be heard on all issues and the opportunity to challenge the former special master's conclusions and examine him on any alleged bias. Significantly, unlike the *Kempthorne* case, Petitioners offered no evidence that the report and the proposed plan prepared by the former special master in this case were tainted by any conflicts of interests.

Indeed, the attempt by Petitioners to elevate an unpublished interlocutory order to the level of a precedent based on gross mischaracterization is disingenuous. The Sixth Circuit's unpublished order cannot serve as a binding precedent, let alone represent a major "split among the circuits." *In re Patricia Miller*, 377 F.3d 616, 622 (6th Cir. 2004). Petitioners' action in this Court merely demonstrates their apparent determination to further protract this almost decade-long litigation and to avoid a hearing on their non compliance with the Consent Decree.

II. The Sixth Circuit's Decision is Plainly Correct.

The Sixth Circuit correctly denied the Petitioners' petition for writ of mandamus. Mandamus is an "extraordinary remedy to be reserved for extraordinary situations," *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). A writ of mandamus should not issue unless the petitioner shows both a "clear and indisputable" right to relief and that "the error is irremediable by regular appellate remedies." *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000). Clear error alone does not support the issuance of a writ of mandamus because an error – even a clear one – could be corrected on appeal without irreparable harm. *Nat'l Ass'n of Crim. Def. Lawyers v. United States DOJ*, 182 F.3d 981, 987 (D.C. Cir. 1999). Whether or not a writ should be granted rests within the sound discretion of the Sixth Circuit. *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394, 403 (1976).

Based on the record, the Sixth Circuit found that Petitioners had failed to demonstrate "a clear and indisputable" right to relief because they failed to show that the

technical advisors were acting in a quasi judicial capacity. Even assuming, *arguendo*, that the former special master acted improperly, he had been discharged as a special master and a new panel had been appointed to replace him. (Pet. App. 6a-7a, 12a.)

Indeed, Petitioners have offered no evidence or legal authority to support their allegation that the *ex parte* communication between Judge Nixon and the former special master was improper in the first place. Contrary to Petitioners' representation, FED. R. CIV. P. 53 does not prohibit *ex parte* communication between a special master and the court; rather, it leaves the issue to the judge's discretion.[1] (*Id.* at 91a.) Judge Nixon was acting within his sound discretion when he relied on the report from the special master. *See In re Brooks*, 383 F. 3d 1036, 1042 (D.C. Cir. 2004) (refusing to issue a writ of mandamus where there was no evidence that the judge had acquired "personal knowledge of disputed evidentiary facts"). The steps taken by the district judges – Judge Nixon's decision to vacate the October 2004 Order, his *sua sponte* recusal, and Judge Haynes' discharge of the former special master – are motivated by their desire to avoid protracted discovery battle over collateral issues and to resolve the issues as quickly as possible for the benefit of the children in the TennCare program, a desire obviously not shared by Petitioners here.

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[1] When Judge Nixon appointed the special master in this case in April 2002, FED. R. CIV. P. 53 did not require that orders appointing special masters address the topic of *ex parte* communication between the court and the special master. It was not until December 2003 that Rule 53 was amended to add the requirement. (Pet. App. 90a-91a.)

The Sixth Circuit's denial of the extraordinary writ also turned on the Sixth Circuit's factual finding that the writ was not necessary under the circumstances. A new judge has been assigned to the case. Petitioners will have full discovery on all the issues relevant to the report and the proposed plan. Petitioners will have full opportunity to be heard and to challenge the report and the proposed plan in front of a new judge. Under the facts of this case, the Sixth Circuit cannot be said to have abused its broad discretion in denying the extraordinary writ.

III. Invoking the Court's Supervisory Power Is Improper Because It Invites This Court to Second Guess The Lower Courts' Factual Findings Based On Pure Speculation.

Stripped of their alarmist contentions based on mischaracterization of the Sixth Circuit decision, Petitioners are really seeking to invoke this Court's extraordinary power based on speculation of possible bias. Petitioners fail to demonstrate how this case presents any compelling reason to justify this Court's exercise of its supervisory power before a final judgment has been entered. U.S. Sup. Ct. Rule 10.

The issues below involved the district court's appointment of experts and the lower courts' sound exercise of their discretionary duties in managing their own cases. These are not the type of issues that rise to the level of such "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." U.S. Sup. Ct. Rule 11; *Rice v. Sioux City Memorial Park Cemetery, Inc. et al.*, 349 U.S. 70, 77 (1955) (writ of certiorari dismissed as improvidently granted because case is one of "isolated significance" not

involving principles of importance to the public). In addition, the determination of the disqualification issue turned on specific factual findings (by both the district court and the Sixth Circuit).

Petitioners' arguments are premised on alleged "actual and apparent bias" on the part of the special master and the experts. (Pet. at p. 18.) Yet, other than pure speculation and insinuations, Petitioners have not even explained how, in light of the steps taken by the district court, any "bias" as a result of the *ex parte* communication between the *former* judge and the *former* special master could possibly prejudice Petitioners in the litigation going forward.

The undisputed record demonstrates that a new judge has been appointed and new monitors selected. The new judge has ordered full discovery and full hearing on the disputed issues in this case. (Pet. App. at 13a-14a.) Therefore, even to give credence to Petitioners' concerns, this Court would have to accept Petitioners' following unwarranted assumptions: 1) The new judge cannot perform his duties independently although there is no allegation of bias against him; 2) the five newly appointed monitors cannot discharge their duties independently; 3) the State will not have an opportunity to examine the technical advisor and his experts on their report and proposed remedial plan, even though the new judge has ordered full discovery and a hearing; and 4) any alleged error cannot be corrected in the normal appellate review process upon a final judgment. Unwarranted assumptions cannot serve as the basis for the grant of certiorari jurisdiction, much less a summary reversal. *NLRB v. Hendricks Country Rural Electric Corp.*, 454 U.S. 170, 176, fn. 8 (1981) (writ of certiorari on cross-petition was dismissed as improvidently

granted because it presented primarily a question of fact that did not merit Court review); *General Talking Pictures Corp. v. Western Electric Co. et al.*, 304 U.S. 175, 178 (1938) (refusing to issue a writ on questions dependent on the facts because "granting of the writ would not be warranted merely to review the evidence or inferences drawn from it"); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924) (writ of certiorari dismissed because case presented "primarily a question of fact" which "is not a ground upon which the court granted the petition").

Essentially, Petitioners are unhappy with the lower courts' decisions and the experts' recommendations. Petitioners are attempting to invoke this Court's certiorari jurisdiction based on unsupported and unwarranted allegations that the new judge, the technical advisor and the new monitors are "biased." Granting the petition here based on an imaginary conflict among the circuits, mere dissatisfaction with court orders, and rampant speculation would pose a "direct threat" to the integrity of the judicial process. It would give any dissatisfied litigant access to this Court's extraordinary supervisory power. It would also permit an end run around the well established rule against interlocutory appeals and piecemeal litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DAVE GOETZ, Commissioner, Tennessee Department of Finance and Administration, et al.,

Petitioners,

v.

JOHN B., by his next friend, L.A., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PETITIONERS' REPLY BRIEF

The Brief in Opposition confirms the extraordinary nature of this case. For all of Respondents' pleas about "specific factual findings" below, Opp. 15, *see* Opp. 8, 14, they cannot deny that the court of appeals based its legal ruling on precisely the same facts on which Petitioners rely in this Court. Specifically, the court below did not question Petitioners' showing that the court-appointed "technical advisors" were either actually or apparently biased, nor did it deny that these judicially appointed officers and the fruits of their substantive *ex parte* collaboration with the now-recused district court judge would continue to influence the course of proceedings; it simply held as a matter of law that nothing could be amiss with any of this.

The relevant facts, drawn directly from the record in the district court, remain undisputed.

The members of the OSM conferred with Respondents and unnamed "concerned advocates" over many months and then relayed partisan concerns to Judge Nixon *ex parte*, ultimately proposing findings of noncompliance and a sweeping injunction against Petitioners; Judge Nixon adopted the proposed findings and provisionally adopted the injunctive relief wholesale in his order of October 2004; all of this occurred unbeknownst to Petitioners, who were afforded no notice or opportunity to respond before Judge Nixon issued his order. *See* Pet. 4-6, App. 24a-69a. Although Judge Nixon later recused himself, the OSM members were reappointed by Judge Haynes to "perform the same duties," Pet. 8, App. 4a, to ensure that their "acquired knowledge" would continue to guide the proceedings. App. 100a, 112a; *see also* Opp. 5 ("Judge Haynes . . . explained that the retention of the technical advisors was necessary because he 'did not want to lose the . . . acquired knowledge that they have accumulated in their work.'"). Judge Haynes is now considering the judicial relief proposed by the OSM – notwithstanding that it was vacated by Judge Nixon – while foreclosing inquiry into the *ex parte* communications that generated that proposal. *See*

Pet. 7-9, 15; App. 13a, 133a-34a, 138a. This is occurring despite Petitioners' showing that the members of OSM, now serving as the court's "technical advisors," demonstrated bias warranting their disqualification (or at least discovery) prior to October 2004. *See* Pet. 6-9, 14-16.

The Sixth Circuit looked at these facts and summarily disposed of the matter via unpublished order, just as Respondents say. Opp. 6, 12. Its rationale is the same one advanced by Respondents – *the federal courts should be indifferent* to (i) whether these judicially-appointed officers are, in actuality or appearance, biased partisans, and (ii) whether such officers' tainted work is relied upon by a district court. The split between the Sixth and D.C. Circuits could not be starker. *See* Pet. 10-11, 17. Respondents, without even citing the D.C. Circuit's analysis, say nothing meaningful to the contrary. *See* Opp. 11.

Even were there no circuit split, however, exercise of this Court's supervisory authority would be warranted. The decision below has troubling implications for the integrity of the judicial process in the federal courts. It ignores the revelations that led to the recusal of Judge Nixon and that show bias on the part of the officers whom Judge Haynes has now reappointed and whose proposals he has seized upon. As disquieting as such complacency would be in any case, it is all the more damaging here because this case is so prominent in the public eye – something Respondents, again, do not dispute. *See* Pet. 14, 18.

1. The thrust of the Opposition is that all this should be left to the discretion of the courts below. This is but the latest installment in Respondents' campaign, dating to October 2004, to fend off meaningful inquiry into the OSM's *ex parte* communications. Let us briefly review the maneuvers that occurred below:

- When Petitioners, upon learning of the *substantive ex parte* contacts from Judge Nixon's October 22, 2004 order, moved for discovery into the contacts, Respondents moved immediately "to Temporarily Suspend

Proceedings." *See* App. 22a-23a. Judge Nixon granted that suspension the next day over Petitioners' objection. *See* Pet. 7.

- When the suspension was about to expire in January 2005, Respondents moved for *renewed* suspension, which Judge Nixon effectively granted via inaction, *see* Pet. 7, even "while [he] determined issues raised in a companion TennCare case." Opp. 4. Thus Judge Nixon held this case in abeyance for *more than a year* at Respondents' behest and over Petitioners' objections.[1]
- When Judge Nixon finally reopened the case in November 2005, *Respondents* moved to have the October 2004 order vacated in order to obviate further inquiry into the *ex parte* communications. *See* Pet. 7, 19a.[2]
- When Judge Nixon vacated his order in December 2005, he denied Petitioners' motion for discovery into the *ex parte* communications as moot. Only when Petitioners renewed that motion did he finally recuse himself in *February 2006* (15 months after Petitioners' November 2004 motion). *See* Pet. 1, App. 17a-21a.
- When Judge Haynes assumed control of the case, he decided within a week to retain the

---

[1] Respondents' complaint that Petitioners seek "to further protract" this litigation, Opp. 12, thus comes with irony and poor grace. Since October 2004, it is *Respondents* who have interposed obstruction and delay while Petitioners struggled to have the questions raised by the OSM's *ex parte* contacts resolved so that full and fair proceedings might resume apace.

[2] Respondents' account that the parties *jointly* proposed vacatur of the October 2004 order is misleading. Opp. 4. Petitioners opposed the order and its invasive relief from the moment it was issued, and would have gladly welcomed its vacatur at any point. But vacatur came about only when Respondents relinquished their victory for the express purpose of preventing inquiry into the *ex parte* communications.

members of the OSM, renaming them as "technical advisors," who would (i) "perform the same duties" as they did previously, Pet. 8, App. 4a, (ii) continue to contribute their "acquired knowledge" to the case, Pet. 8, App. 100a, 112a, Opp. 5, and (iii) inform his consideration of the same judicial relief they had formulated *ex parte* with Judge Nixon. *See* Pet. 8-9, App. 8a-9a, 13a, 133a-34a, 138a. At the same time, Judge Haynes foreclosed any inquiry into the *ex parte* communications and bias of the so-called "technical advisors." *See* Pet. 9, App. 13a, Opp. 6.

- When Petitioners, for lack of any other recourse, sought a writ of mandamus directing disqualification or at least targeted discovery, the Sixth Circuit summarily disposed of their petition with the single paragraph set forth at App. 3a. That reasoning boils down to the propositions that (i) there has been no showing that the relevant individuals "were or are acting in a quasi-judicial capacity" so as to be subject to any prohibition against judicial bias, and (ii) any fruits of those individuals' bias and conduct *ex parte* in the form of adverse findings and proposed judicial relief are simply "matters . . . of record [that] can be litigated by the parties." App. 3a.

Much is properly entrusted to "the lower courts' exercise of their discretionary duties." Opp. 8. But this matter no longer should be. The questions presented are in need of answer by this Court.

2. As to the questions presented (or rather, one of them, for Respondents *ignore* the second), Respondents say that we have "grossly mischaracterize[d]" the decision below. Opp. 9, 12. But their rhetoric is unadorned by any analysis of what the Sixth Circuit actually held. In full view of the undisputed facts that the newly christened "technical advisors," had, while serving as Judge Nixon's

OSM, conferred privately with Respondents' counsel and "concerned advocates" and had proposed adverse findings and judicial relief, the Sixth Circuit found no demonstration that "they *were* or are acting in a quasi-judicial capacity." App. 3a (emphasis added).

Respondents now blow past the critical "were" part of that disjunctive, even as they go on to acknowledge – as Judge Haynes did – that "*the former special master was acting 'in a quasi-judicial capacity' when he prepared the proposed remedial plan and the report.*" Opp. 10 (emphasis added); *see also* App. 103a, 127a. That is *dispositive*: Contrary to the Sixth Circuit's account, the individual members of the OSM plainly "*were* . . . acting in a quasi-judicial capacity," which *did* render them subject to the prohibition against bias. The OSM members were subject to disqualification at *that* time; and, to the extent that the *ex parte* communications of 2004 revealed impermissible bias, the OSM's service and work product (in the form of the proposed findings and relief adopted in the October 2004 order) from that point forward were *ultra vires* and should be extirpated. *See In re Kempthorne*, 449 F.3d 1265, 1271 (D.C. Cir. 2006).[3] The Sixth Circuit plainly erred in blinding itself, as a matter of law, to Petitioners' showing of bias on the part of the former OSM members while they were shaping this case.

Moreover, Respondents elide the reality of the present – that the former members of OSM now continue their

[3] Respondents' acknowledgement that the OSM was indeed filling a quasi-judicial function at the time of the *ex parte* communications makes it impossible to reconcile the Sixth Circuit's decision with *Kempthorne*. Whereas the Sixth Circuit has permitted OSM's proposed findings and judicial relief to remain matters of record to "be litigated by the parties," without regard for any bias, App. 3a, *Kempthorne* held that "any such work product" must be extirpated without delay, because "only suppression can ensure that neither [Respondents] nor the district court will rely upon the reports in the future, to the detriment of the public's confidence in the judicial process." 449 F.3d at 1271 (internal quotation omitted).

same role under the title of "technical advisors." Judge Haynes is preserving their quasi-judicial function and the fruits of it. He has expressly prescribed that they shall "*perform the same duties*." Pet. 8, App. 4a (emphasis added). He has ensured that the knowledge OSM "acquired" in conferring privately both with Respondents' counsel and then with Judge Nixon will continue to guide the proceedings. App. 100a, 112a; *see also* Opp. 5. And he has seized upon the very judicial relief the OSM formulated *ex parte* with Judge Nixon as the object of further proceedings. *See* Pet. 8-9, App. 8a-9a, 13a, 133a-34a, 138a. Thus the same court advisors have been reappointed to waddle like ducks and to quack like ducks, just as they did before; they are simply no longer to be *called* "ducks." Surely the integrity of the federal judiciary requires more.

Far from denying this, Respondents embrace the proposition that a "technical advisor" performing these functions *can indeed be biased*. *See* Opp. 10. Such a rule permitting partisan bias on the part of such judicial advisors is without precedent. *See* Pet. 12-13.

3. Respondents insist that there is nothing "to support [Petitioners'] allegation that the *ex parte* communication between Judge Nixon and the former special master was improper in the first place." Opp. 13. Respondents thus simply whistle past our showing in the Petition that the *ex parte* communications concerned the merits of the case and thereby violated the governing orders in this case, the federal rules, and the canons of ethics:

- Judge Nixon's orders authorized confidential substantive *ex parte* communications *only* with the parties – *not* the court. *See* Pet. 4 n.1, 14; App. 78a-79a.
- Judge Nixon confirmed that his orders foreclosed the OSM from communicating with the court on disputed merits issues. *See* Pet. 4 n.1; App. 74a-75a.
- FEDERAL RULE OF CIVIL PROCEDURE 53 warns against *ex parte* communications between

special master and district court.[4] *See* Pet. 4 n.1; App. 91a.

- Canon 3, § A(4) of the *Code of Conduct for United States Judges* (2004 ed.), as also applicable to a special master, prohibits substantive *ex parte* communications. *See* Pet. 12.
- Courts have consistently held substantive *ex parte* communications to be illicit. *See* Pet. 12; *Edgar v. K.L.*, 93 F.3d 256, 258 (7th Cir. 1996); *In re Kensington, Int'l, Ltd.*, 368 F.3d 289, 309-12 (3d Cir. 2004).

Beyond this facial impropriety, Respondents fail to grapple with the facts that the OSM's substantive *ex parte* contacts with Judge Nixon (i) expressly relayed the concerns of still-unnamed "concerned advocates"; (ii) occurred in conjunction with the OSM's *ex parte* substantive communications with Respondents' counsel; (iii) featured submissions by the OSM's Sara Rosenbaum, whom *Respondents themselves* had previously retained their expert *in this very case*; and (iv) resulted in a proposal for breathtakingly invasive relief (which the Respondents never address) that reads as though it had been written by Respondents themselves. *See* Pet. 14-15; App. 33a-69a, 158a-59a, 198a. If more is required to make out impropriety amounting to an appearance (at least) of bias, then surely discovery – which we have sought but been denied since November 2004 – is warranted to dispel any doubt about the integrity of this proceeding.

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[4] Although Respondents observe that Rule 53 was amended in relevant part after Judge Nixon's 2002 appointment order, the amended version applies "insofar as just and practicable, [in] all proceedings . . . pending" on December 1, 2003. Order of the Supreme Court (March 27, 2003). Moreover, Judge Nixon's earlier order, in excluding *ex parte* communications between court and special master, was entirely consistent with the subsequent amendment, which merely codified preexisting precepts from the *Code of Conduct for United States Judges*.

4. Respondents assert that it was "a matter of public record" prior to October 2004 that Judge Nixon had been receiving such *ex parte* input from the OSM. *See* Opp. at 3. But the only support Respondents offer is a transcript passage where Judge Haynes made a similar assertion. *See* Pet. App. 99a. Neither Judge Haynes nor Respondents have cited anything to support this. The only *ex parte* communications of which Petitioners were aware concerned (or were thought to concern) purely *administrative*, not *substantive*, matters, rendering them entirely benign. Not until issuance of the October 2004 order did Petitioners learn that *substantive ex parte* communications – *i.e.*, communications concerning the underlying merits of the case – had transpired. Only those *substantive* communications were forbidden. *See In re Brooks*, 383 F.3d 1036, 1044 (D.C. Cir. 2004) (communications between court and special master did not give rise to legitimate concern where "those contacts were of a procedural and not a substantive nature"); *Edgar*, 93 F.3d at 257-58 (meaningful revelation did not occur until defendants learned that *ex parte* communication between court and expert had "covered the merits of the case," where prior communications had been "administrative and 'social.'"). Indeed, *Respondents* themselves requested vacatur of Judge Nixon's order proposing sweeping relief in their favor and Judge Nixon recused himself in the wake of the October 2004 revelations without *anyone* hinting that Petitioners might have waived the instant concerns. Respondents' notion of waiver was not credited below and has been contrived to thwart further inquiry.

5. Unable to defend the substance of the decision below, Respondents attempt to deny its import, suggesting that the advent of Judge Haynes and his appointment of several additional advisors cures any conceivable harm. *See* Opp. 14-15. Nonsense. The ruling below is perpetuating the role of the OSM advisors and their handiwork, and

thereby perpetuating the taint they impose on these proceedings. *See* Pet. 7-9, 15. Thus, far from rooting out the seeds of any bias, the district court, unrestrained by the Sixth Circuit, is actively cultivating them. As for the new monitors, Judge Haynes has specifically instructed them (over Petitioners' objections) to *confer* with the former members of the OSM, so that the OSM's "acquired" knowledge (precisely what is of concern to Petitioners) will thereby be preserved. *See* App. 5a, 7a, 100a, 112a.[5]

6. Respondents note that the decision below is unpublished. *See* Opp. 12. That is noteworthy indeed. Petitioners know of no other court of appeals that has deemed its disposition of a mandamus petition concerning bias and substantive *ex parte* communications on the part of judicial officers unworthy of publication. The courts of appeals have uniformly accorded such petitions careful treatment for the benefit of the Federal Reports. *See*, *e.g.*, *Kempthorne*, 449 F.3d 1265; *In re Brooks*, 383 F.3d 1036; *In re Kensington Int'l Ltd.*, 353 F.3d 211 (3d Cir. 2003); *In re Kensington Int'l Ltd.*, 368 F.3d 289; *Edgar*, 93 F.3d 256. The Sixth Circuit's unpublished treatment hardly squares with the compelling public and institutional interest in conducting full and fair inquiry into any serious question of judicial misconduct. *See* The Judicial Conduct and Disability Act Study Committee, *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, at 1-2, 5 (Sept. 2006).

7. Respondents also note that this case is interlocutory and arrives by way of a mandamus petition. *See* Opp. 12, 14, 16. That is no more noteworthy than is the fact that this case concerns bias on the part of judicial officers who are actively influencing the proceedings below. Writs of mandamus (which are, by definition, interlocutory) are

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[5] Although Respondents state that Judge Haynes set an evidentiary hearing for "June 19, 2006," Opp. 5, it in fact was postponed and has yet to be held.

the appropriate vehicles for addressing such issues and directing recusals, as courts have always noted. *See, e.g.*, *In re Aetna Cas. and Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc) (quoting *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025 (9th Cir. 1982)); *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (quoting *Berger v. United States*, 255 U.S. 22, 36, 65 (1921)).[6] This Court itself has explained why this is so: "The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious." *Berger v. United States*, 255 U.S. 22, 36 (1921). Therefore, to the extent this Court would exercise its supervisory power to combat this particular "evil," it can, as a practical matter, do so only in this posture.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for plenary review. Alternatively, the decision below should be summarily reversed.

Respectfully submitted,

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[6] Indeed, at least one court of appeal *insists* that any such concern be promptly raised via writ of mandamus, or else it is waived. *See United States v. Towns*, 913 F.2d 434, 443 (7th Cir. 1990) (citing cases).